1989

Discriminatory Intent and the Taming of Brown

David A. Strauss

The University of Chicago Law Review

VOLUME 56 NUMBER 3 SUMMER 1989

Discriminatory Intent and the Taming of *Brown*

David A. Strauss†

Table of Contents

† Professor of Law, The University of Chicago. I would like to thank Albert Alschuler, David Currie, Richard Epstein, Larry Kramer, Michael McConnell, Richard Pildes, Richard Posner, Stephen Schulhofer, Geoffrey Stone, Cass Sunstein, and the participants in the University of Chicago work in progress seminar for their comments on an earlier draft. I am also grateful to Stephanie Dest, Steven Suckow, Debra Buhring, and Michael Faris for their able research assistance. The Frieda and Arnold Shure Research Fund provided financial support.

I. Introduction

From the beginning, nearly everyone has agreed that the central purpose of the Equal Protection Clause is to outlaw certain kinds of discrimination.[1] But what is "discrimination"? Only recently has the Supreme Court given a clear answer to that question: discrimination in violation of the Equal Protection Clause consists of acting with discriminatory intent.[2] In this paper I will argue that although this conception of discrimination is sometimes useful, it is inadequate in a fundamental way; that its inadequacy explains the problematic character of several of the most controversial decisions of recent times; and that this inadequacy is the result of what I will call the taming of *Brown v Board of Education*[3]—an excessively cautious and conservative approach to the implications of the Supreme Court's greatest anti-discrimination decision.

The discriminatory intent standard has both defenders and critics.[4] But often neither side recognizes either the genuine strengths or the deep weaknesses of the discriminatory intent approach. Both its strengths and weaknesses lie in the fact that the discriminatory intent test reflects a requirement of impartiality: according to the discriminatory intent standard, invidious discrimination consists of a failure to be impartial.[5] That is a strength because impartiality is not an empty notion; on the contrary, it is useful and important in many contexts.

---

[1] See, for example, *Strauder v West Virginia*, 100 US (10 Otto) 303, 307-08 (1879); *The Slaughter-House Cases*, 83 US (16 Wall) 36, 81 (1872).

[2] See *Washington v Davis*, 426 US 229, 246-48 (1976); *Village of Arlington Heights v Metropolitan Dev. Housing Corp.*, 429 US 252, 265 (1977) ("Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause."); *Personnel Administrator v Feeney*, 442 US 256, 272 (1979); *Hunter v Underwood*, 471 US 222, 227-28 (1985). It is sometimes suggested that showing a disproportionate racial impact is also a prerequisite to establishing a violation of the Equal Protection Clause. As I explain in note 62, that view is mistaken.

[3] 347 US 483 (1954).

[4] For defenses, see, for example, John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 Yale L J 1205 (1970); Paul Brest, Palmer v Thompson: *An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 S Ct Rev 95. For criticism see, for example, Laurence H. Tribe, *American Constitutional Law* §16-20 (Foundation, 2d ed 1988); Michael J. Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U Pa L Rev 540 (1977); Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 Phil & Pub Aff 107, 111-17 (1976). For discussions containing both defense and criticism, see Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 Harv L Rev 1 (1976); Theodore Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 NYU L Rev 36 (1977); Colloquium, *Legislative Motivation*, 15 San Diego L Rev 925 (1978).

[5] See section II below.

Ultimately, however, impartiality—and discriminatory intent—fail as a comprehensive account of discrimination. I will argue for this proposition not by trying to show that the discriminatory intent standard leads to "wrong" results or permits unjust conditions to persist (although I believe both of these to be true). Rather, I will take the discriminatory intent standard as seriously as possible and follow it where it leads.

Specifically, I will first try to give the most plausible possible definition of discriminatory intent. Then I will apply the discriminatory intent standard to several important issues. My argument is that when the discriminatory intent standard is applied rigorously, it defeats itself. It does so by dissolving into questions that are speculative and, in some instances, literally meaningless.

I will illustrate this failure by discussing two unusually important and controversial decisions—*Shelley v Kraemer*,[6] in which the Supreme Court held that the Equal Protection Clause forbids state courts from enforcing racially restrictive covenants, and *Roe v Wade*,[7] which struck down most laws restricting abortion. It is not obvious that the discriminatory intent standard applies to *Shelley* and *Roe* at all—*Shelley* is conventionally regarded as a "state action" case, *Roe* as a case concerning the right to privacy or reproductive freedom. But I will suggest that *Shelley* must be seen, and that *Roe* can profitably be seen, as cases that raise the question whether the government has engaged in impermissible discrimination.

The discriminatory intent standard is incapable of resolving the issues raised by *Shelley* and *Roe*. When rigorously applied to the issues raised by those cases, that standard leads to questions that are literally meaningless. That is why *Shelley* and *Roe* are such problematic decisions: not because they represent unwarranted judicial "activism" but because the currently available doctrinal tools do not provide a useful way to analyze the issues they present.

If this problem—the potentially incoherent nature of the discriminatory intent standard—were confined to the issues raised in *Shelley* and *Roe*, it might be interesting for the light it shed on those cases, but it would hardly indict the discriminatory intent standard itself. A standard that cannot handle notoriously difficult decisions like *Shelley* and *Roe* is not necessarily deeply flawed. But in fact the problems that arise in *Shelley* and *Roe* are endemic.

---

[6] 334 US 1 (1947).

[7] 410 US 113 (1973).

Shelley and *Roe* are only the most dramatic illustrations of a doctrinal inadequacy that occurs nearly across the board: I will argue that the discriminatory intent standard leads to speculative or meaningless questions in all but a single limited category of cases.

Similarly, if the discriminatory intent standard were the only conception of discrimination with significant support in precedent, it would be difficult to criticize the Court for adopting it. But in fact when the Supreme Court adopted the discriminatory intent standard—in *Washington v Davis*,[8] which was decided twenty-two years after *Brown*—several alternative conceptions of discrimination were possible. These alternatives—rooted in notions like stigma, subordination, and second-class citizenship—had substantial support in the first decisions interpreting the Equal Protection Clause, in *Brown* itself, and in the decisions that followed *Brown*. The Court's evident objection to these alternatives was twofold: they seemed far more vague than the discriminatory intent standard, and they seemed far more threatening to established institutions. To adopt any test other than the discriminatory intent test, the Court reasoned in *Washington v Davis*, would "raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes."[9]

It is in this sense that *Washington v Davis* constituted a "taming" of *Brown* and a conservative approach to that decision: of the several possible conceptions of discrimination, the Court chose the one that appeared to be the most determinate and the least far reaching. But these supposed virtues of the discriminatory intent standard are illusory. The discriminatory intent standard is in fact at least as vague and indeterminate as the alternatives; and rigorously applied, it is no less threatening to established institutions.

II. The Taming of *Brown*

In this section I will describe how the discriminatory intent standard came to be the central principle of the Equal Protection Clause. Until *Washington v Davis* was decided, there were several possible answers to the question: what constitutes impermissible discrimination under the Equal Protection Clause? *Washington v Davis*, in settling on the discriminatory intent standard, chose the most tame of those possible answers.

---

[8] 426 US 229 (1976).

[9] Id at 248.

I will be concerned with sex discrimination in later sections, but I limit the discussion in this section to race, with only an occasional mention of the law of sex discrimination. The reason is that the development of the law of sex discrimination is both more compressed—it was 1971 before the law of sex discrimination reached a point comparable to that which the law of race discrimination reached during Reconstruction[10]—and more complex, since racial classifications, but not classifications on the basis of sex, are almost automatically invalidated.[11] Because the definition of discriminatory intent and the underlying purposes of the discriminatory intent standard are the same in both areas, it should be enough to discuss primarily race in this section.

A. Five Conceptions of Discrimination

At the time *Washington v Davis* was decided, there were available to the Court roughly five possible approaches to the question: what constitutes impermissible discrimination in violation of the Equal Protection Clause? I say "roughly" because the approaches overlap and their boundaries are not clear. In the next few pages I will outline these approaches. I will not attempt systematically to defend any of these approaches, or even to define them clearly; those are tasks for another day. My only objective is to give a sense of the possible alternatives to the discriminatory intent standard.

1. Lack of impartiality.

According to this approach, discrimination is an impermissible failure to be impartial between the races. However the government

---

[10] *Reed v Reed*, 404 US 71 (1971), was the first case to apply any form of heightened scrutiny to an explicit classification based on sex. For earlier cases in which the Court upheld an explicit classification based on sex, see *Hoyt v Florida*, 368 US 57 (1961); *Goesaert v Cleary*, 335 US 464 (1948). *Strauder v West Virginia*, 100 US (10 Otto) 303 (1879), was the first case to invalidate a racial classification.

[11] Affirmative action aside, the Court has not upheld a racial classification since *Korematsu v United States*, 323 US 214 (1944). Probably the best understanding of the law is that racial classifications will be upheld only in extraordinarily exigent circumstances (a category that might include *Korematsu*, to the extent that decision is not wholly discredited). See *Lee v Washington*, 390 US 333, 334 (1968). By contrast, no majority of the Court has ever gone further than to say that classifications based on sex may not be "archaic and overbroad" and must be "substantially related" to achievement of the statutory objective, *Craig v Boren*, 429 US 190, 198 (1976), and the Court has upheld explicit gender classifications, not justified as affirmative action measures, on several occasions. See, for example, *Rostker v Goldberg*, 453 US 57 (1981); *Michael M. v Sonoma County Superior Court*, 450 US 464 (1981).

treats whites, it must treat blacks the same way. No more should the government have different rules for people based on their race than a judge should have different rules for litigants based on their personal relationship to her. As the Court said in *Strauder v West Virginia*[12]—an 1880 decision invalidating a law that explicitly excluded blacks from juries—"the law in the States shall be the same for the black as for the white." In section II, I will argue that this approach and the discriminatory intent standard are essentially equivalent.

2. Subordination.

This is a popular modern notion, and it has support in several opinions. In 1880, *Strauder* condemned "discriminations which are steps toward reducing [blacks] to the condition of a subject race";[13] in 1967, *Loving v Virginia* invalidated anti-miscegenation laws partly on the ground that they are "justifi[ed only] as measures designed to maintain White Supremacy."[14]

There seem to be two ways of understanding subjugation or subordination.[15] One focuses on the accumulation of disadvantages.[16] A racial group that is worse off than all others in nearly every significant measure of human welfare might be said to be a "subject race." The second emphasizes the state of being personally subject to the will of another. Slavery was the clearest case of

---

[12] 100 US (10 Otto) 303, 307 (1879).

[13] Id at 308.

[14] 388 US 1, 11 (1967).

[15] The classic contrast between ethnic relations in which one group is subordinate and "horizontal" relations in which segregation does not involve subordination is presented in Max Weber, *Ethnic Segregation and Caste*, in H. H. Gerth and C. Wright Mills, eds, *From Max Weber: Essays in Sociology* 188-90 (Oxford, 1946). Weber associates subordination with the loss of "honor," which suggests a relationship between subordination and stigma. For other general discussions, see, for example, Louis Dumont, *Homo Hierarchicus* 247-66 (Chicago, revised English ed 1970); John Dollard, *Caste and Class in a Southern Town* (Harper, 2d ed 1949); Donald L. Noel, *A Theory of the Origin of Ethnic Stratification*, 16 Social Probs 157 (1968).

For discussions of subordination in connection with the Equal Protection Clause and other prohibitions against discrimination, see, for example, Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 Yale L J 421 (1960); Catharine A. MacKinnon, *Sexual Harassment of Working Women* 3-5, 116-17 (Yale, 1979); Kenneth L. Karst, *Foreword: Equal Citizenship under the Fourteenth Amendment*, 91 Harv L Rev 1 (1977); Brest, 90 Harv L Rev 1 (cited in note 4); Ira Michael Heyman, *The Chief Justice, Racial Segregation, and the Friendly Critics*, 49 Calif L Rev 104 (1961). See also Mary E. Becker, *Prince Charming: Abstract Equality*, 1987 S Ct Rev 201, 238-39; Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 NYU L Rev 1003 (1986).

[16] See MacKinnon, *Sexual Harassment* (cited in note 15); Brest, 90 Harv L Rev at 10-11 (cited in note 4).

subordination.[17] Under this view, the distinctive characteristic of a subordinated group is that its members are systematically subject to violence at the hands of members of another group, or must systematically yield to the commands of members of another group. This conception of subordination has obvious applications in the areas of both race and sex discrimination.

3. Stigma.

This approach focuses less on the concrete effects that a government action has on a group's position and more on the message that the action conveys to others.[18] Stigma in this sense is related to defamation. It is also related to the notions of stigma used elsewhere in the law—for example, in defining the difference between criminal and civil penalties and in determining when a person has been deprived of liberty within the meaning of the Due Process Clause.[19]

One of the most famous sentences in *Brown* emphasized that racial segregation of black children "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[20] This suggests that the evil of racial segregation is the stigma it inflicts. (The emphasis on "status in the community" might also reflect a subordination approach.) Similarly, the *Strauder* Court suggested that the vice of excluding blacks from juries was that it was "practically a brand upon them . . . an assertion of their inferiority."[21]

Because stigma has analogies in relatively well-developed areas of the law, it may seem somewhat less vague than subordination. But the class of stigmatizing measures may be larger than appears at first. In particular, this approach (like the subordination approach) might lead to the conclusion that certain measures conventionally viewed as affirmative action—constitutionally sus-

---

[17] See Orlando Patterson, *Slavery and Social Death* (Harvard, 1982). See generally A. Leon Higginbotham, Jr., *In the Matter of Color* (Oxford, 1978).

[18] See, for example, Black, 69 Yale L J at 426 (cited in note 15); Louis H. Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U Pa L Rev 1 (1959); Karst, 91 Harv L Rev at 48-53 (cited in note 15); Brest, 90 Harv L Rev at 8-10 (cited in note 4); Richard A. Wasserstrom, *Philosophy and Social Issues* 21 (Notre Dame, 1980); Edmond Cahn, *Jurisprudence*, 30 NYU L Rev 150, 159, 160 (1955); Heyman, 49 Cal L Rev at 113-15 (cited in note 15). The best known general discussion is Erving Goffman, *Stigma* (Prentice-Hall, 1963). See also Kenneth B. Clark, *Prejudice and Your Child* 37-65 (Beacon, 2d ed 1963).

[19] See, for example, *Board of Regents v Roth*, 408 US 564, 573-74 (1972).

[20] *Brown*, 347 US at 494.

[21] *Strauder*, 100 US (10 Otto) at 308.

pect, but possibly permissible—are actually constitutionally required. For example, an explicitly race-neutral policy that had the effect of excluding all blacks from admission to a state university might brand blacks as inferior by conveying the message that, as a group, they are not as capable as whites.[22] If so, a race-conscious deviation from this policy would, under the "stigma" conception of discrimination, be required by the Equal Protection Clause.

4. Second-class citizenship.

This approach, too, has roots in *Strauder*, which interpreted the Equal Protection Clause as granting blacks an "exemption from legal discriminations, implying inferiority in civil society."[23] This language seems to describe what we today would call second-class citizenship. The government may not create superior and inferior classes of people "in civil society." Whatever the attributes of membership in civil society are, the government may not grant them to whites while denying them to blacks.

If "civil society" were broadly understood to include all aspects of social life, the principle that the government may not relegate blacks to second-class citizenship would be essentially equivalent to the principle that blacks may not be subordinated.[24] Alternatively, one might concede that "civil society" is narrowly defined to include only those activities closely connected to politics and political participation—there is some evidence that the framers of the Fourteenth Amendment held this view[25]—but argue that the question is not whether a law explicitly disables blacks from engaging in those activities, but whether it has the effect of making blacks substantially less able to engage in them. Under this view, even if education is viewed as an aspect of "social life" rather than

---

[22] For an argument to this effect, see David A. Strauss, *The Myth of Colorblindness*, 1986 S Ct Rev 99, 126-27. The contrary argument, of course, is also made: that affirmative action measures stigmatize minorities by suggesting that they are unable to succeed without special assistance.

[23] *Strauder*, 100 US (10 Otto) at 308.

[24] This is essentially the approach taken in Charles L. Black, Jr., *Structure and Relationship in Constitutional Law* 53-61, 95-96 (LSU, 1969), and Karst, 91 Harv L Rev 1 (cited in note 15). Both also associate second-class citizenship with stigma.

[25] See, for example, Eric Foner, *Reconstruction* 367-72 (Harper & Row, 1988); Michael J. Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 Colum L Rev 1023, 1027-28 (1979); John P. Frank and Robert F. Munro, *The Original Understanding of "Equal Protection of the Laws,"* 1972 Wash U L Q 421, 442-43, 450. Critics of *Brown* who claim that the decision was unfaithful to the original understanding of the Fourteenth Amendment urge that the Court did not take this view seriously enough. See, for example, Raoul Berger, *Government by Judiciary* 169-76 (Harvard, 1977).

"civil society," the government might still violate the Equal Protection Clause if it allows blacks, as a group, to receive a level of education that is insufficient to enable them to participate in politics and government, or that enables them to participate only in a way grossly inferior to whites.

However far removed this approach might be from what the Court had in mind in *Strauder*, it gives realistic content to the notion of second-class citizenship, instead of emphasizing formalities. Moreover, this approach resonates both with the distinction between political and social rights that was an important aspect of post-Civil War thought, and with the emphasis on rights to political participation that is a central element of current justifications of judicial review.[26] This approach would support those post-*Brown* decisions that have aggressively protected minority participation in the political process.[27]

5. Encouragement of prejudice.

In *Strauder*, the Court also suggested that the West Virginia statute violated the Equal Protection Clause because it was "a stimulant to that race prejudice which is an impediment to securing . . . equal justice."[28] Several modern cases, including cases decided after *Washington v Davis*, have suggested that the Equal Protection Clause forbids states from encouraging private prejudice.[29]

---

[26] Justifications for judicial review derived from *Carolene Products* footnote 4 (*United States v Carolene Products Co.*, 304 US 144, 152 n 4 (1938)) emphasize that the principal function of the courts, in interpreting the Constitution, is to ensure political participation; if participation is secured, the democratic process can be relied upon to protect other rights. See generally John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard, 1980).

[27] See, for example, *White v Regester*, 412 US 755, 767 (1973). In that (somewhat Delphic) decision, the Court invalidated a state's use of multi-member districts partly on the ground that they "effectively excluded" minorities from participation in the political process.

[28] *Strauder*, 100 US (10 Otto) at 308.

[29] In *Reitman v Mulkey*, 387 US 369 (1967), which I discuss in detail in section III, the Court invalidated an amendment to the California constitution that effectively prohibited open housing laws. The Court relied on the state supreme court's finding that the amendment "was intended to authorize, and does authorize, racial discrimination in the housing market" and that it "will significantly encourage and involve the State in private discriminations." Id at 381. In *Anderson v Martin*, 375 US 399, 402 (1964), where the Court invalidated a state law requiring the race of all candidates to be listed on the ballot, it reasoned, in part, as follows:

> [B]y placing a racial label on a candidate at the most crucial stage in the electoral process . . . the State furnishes a vehicle by which racial prejudice may be . . . aroused . . . . [B]y directing the citizen's attention to the single consideration of race or color,

This approach overlaps with the stigma and subordination approaches somewhat: measures that brand a group as inferior or place it in an inferior position certainly encourage prejudice. The most direct implication of this standard would be to preclude certain forms of government aid to private prejudice, including unusually elaborate guarantees of the right of private persons to engage in racially prejudiced private behavior.[30]

* * *

The last four approaches I described differ from the first—impartiality—in several important respects. First, the impartiality approach focuses on the government; it requires that the government treat blacks and whites alike. Each of the other approaches focuses on the alleged victims of discrimination; they ask what effect the government's action has on blacks. It is conventional to distinguish between "intent tests" and "effects tests"—tests that consider the intent of the government actor and tests that consider the effects of the action on the alleged victims of discrimination.[31] Impartiality is, as I will explain in detail below, an intent standard. The other four approaches all consider effects. They differ from each other in that they are concerned with different kinds of effects.

The second apparent difference between the impartiality approach and the four effects-based conceptions is that the impartiality approach seems much more clearly defined. Each of the others seems vague and open-ended. One of my principal arguments in this paper is that this apparent contrast is an illusion. The impartiality approach, seriously and rigorously applied, mandates an inquiry no less open-ended than that required by the

---

> the State . . . may decisively influence the citizen to cast his ballot along racial lines. . . .The vice lies . . . in the placing of the power of the State behind a racial classification that induces racial prejudice at the polls.

See also *Norwood v Harrison*, 413 US 455, 466, 467 (1973) (discussed in text at notes 109-15):

> A state may not grant the type of tangible financial aid here involved if that aid has a significant tendency to facilitate, reinforce, and support private discrimination. . . . A State's constitutional obligation requires it to steer clear, not only of operating the old dual system of racially segregated schools, but also of giving significant aid to institutions that practice racial or other invidious discrimination.

[30] See text at notes 88-100.

[31] See, for example, Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 Minn L Rev 1049 (1978); Eisenberg, 52 NYU L Rev 36 (cited in note 4); Perry, 125 U Pa L Rev at 553-55 (cited in note 4).

other approaches.

The third difference is that the effects-based conceptions of discrimination seem potentially much more far-reaching than the impartiality approach. The impartiality approach appears to affect only a discrete category of government actions that are based on race. The effects-based conceptions can be interpreted to call into question many established practices and institutions, such as race-neutral measures that exclude blacks from positions of power and prestige and failures to provide disadvantaged groups with an education that permits adequate participation in the political process. I will argue that this apparent contrast is also only apparent. The impartiality approach is in fact not only as open-ended as the others but potentially as threatening to established institutions.

B. The Uncertain Meaning of *Brown*

The central development in modern equal protection law was the decision that Jim Crow—the system of state-enforced, explicit racial segregation—was unconstitutional. The pivotal event in that development was the decision in *Brown v Board of Education*,[32] but the story begins with *Plessy v Ferguson*.[33]

In *Plessy*, the Court upheld a Louisiana statute requiring "equal but separate accommodations for the white and colored races" on trains. In a narrow sense, *Plessy* was not inconsistent with *Strauder*. The West Virginia statute invalidated in *Strauder* made no pretense of treating blacks and whites equally; blacks, but not whites, were excluded from all jury service. By contrast, the Louisiana statute mandated tangible equality: both whites and blacks were excluded from the other race's sections of the train, and both sections were, by law, "equal." In *Plessy*, unlike *Strauder*, one had to make arguments about the intangible, psychological effects of segregation in order to show that an inequality existed.[34] The Court in *Plessy* could, therefore, claim not to be departing from the Reconstruction Era understanding of discrimina-

---

[32] 347 US 483 (1954).

[33] 163 US 537 (1896).

[34] See Brief of Plaintiff in Error at 31, *Plessy v Ferguson*, 163 US 537 (1896) (arguing that the exemption in Jim Crow law for "nurses attending children of the other race" proved that Louisiana tolerated integration when a black person was placed "in an inferior or menial capacity—as a servant or dependent, ministering to the comfort of the white race" but not when a black "claim[ed] equal right and privilege"). See also id at 36 (arguing that the law was "a discrimination intended to humiliate and degrade the former subject and dependent class—an attempt to perpetuate the caste distinctions on which slavery rested").

tion as reflected in *Strauder*.[35]

What *Plessy* did was to confine *Strauder* to its narrowest possible interpretation. After *Plessy*, *Strauder* stood only for the proposition that states may not treat blacks unequally in a tangible way. The Court in *Plessy* dismissed, as too subjective and ephemeral, the argument that psychological effects were as important as tangible effects in determining whether a statute provided equal treatment: in a notorious passage, the Court rejected the stigma argument—"that the enforced separation of the two races stamps the colored race with a badge of inferiority"—on the ground that "[i]f this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it."[36]

In *Brown*, the Court held that de jure segregation in public education violates the Equal Protection Clause. The Court soon extended the holding of *Brown* to all forms of state-enforced explicit segregation, effectively overruling *Plessy*.[37] *Brown* has come to stand for the principle that the Equal Protection Clause almost never permits explicit racial classifications.[38]

While the principle of *Brown* seems clear to this extent, it was not clear, until *Washington v Davis*, which conception of discrimination *Brown* embraced, or how far the principle of *Brown* extended. Did it reach only explicit segregation? Did it extend to all actions that in some sense helped perpetuate the vices of the Jim Crow system, by stigmatizing blacks or keeping them in a subordinate position, even if those actions made no explicit reference to race? Did it require states to ensure substantive equality for black and white citizens, at least in areas like education, even if state-sponsored discrimination had not caused the inequality?

It quickly became clear that the principle of *Brown* had to extend beyond fully explicit racial classifications to measures that, although neutral on their face, were obviously based on surrogates for race. The perfect example was *Gomillion v Lightfoot*,[39] where a state used a grotesque racial gerrymander to exclude all black citizens from a city. The statute did not explicitly mention race, but if the Court had not invalidated the gerrymander, states would have

---

[35] See *Plessy*, 163 US at 544-51.

[36] Id at 551.

[37] See, for example, *Gayle v Browder*, 352 US 903 (1956) (per curiam) (segregated city buses); *Holmes v City of Atlanta*, 350 US 879 (1955) (per curiam) (municipal golf courses); *Mayor of Baltimore v Dawson*, 350 US 877 (1955) (per curiam) (public beaches).

[38] See note 11.

[39] 364 US 339 (1960).

been free effectively to nullify *Brown*. They could simply have replaced explicitly racial school assignments with racially motivated gerrymanders. If explicit racial classifications are unlawful, it makes little sense to allow a government that is subtle enough to use an ostensibly neutral surrogate for race to get away with maintaining the Jim Crow regime. In this sense, the principle of *Brown* had to extend beyond explicit racial classifications. *Brown* had to stand at least for the principle that government decisions, whatever their explicit language, must not in fact be based on race.[40]

That was the minimum necessary content of the *Brown* principle. Anything less would have opened the door to massive evasion. A few cases decided between *Brown* and *Washington v Davis* suggested that the principle of *Brown* extended no further than this.[41] But in the twenty years between *Brown* and *Washington v Davis*, the opinions of the Court, of individual Justices, and of the lower courts suggested other, more far-reaching interpretations of *Brown*.

1. As I have noted, the opinion in *Brown* itself emphasized the effects of racial segregation on the "hearts and minds" of black children and on "their status in the community"—language suggesting one of the more far-reaching conceptions of discrimination, such as stigma or subordination.[42] Several post-*Brown* opinions contained comparable language,[43] and in other decisions, the Court suggested that the government had an obligation to combat, or at least not to encourage, private discrimination.[44]

The commentary, in keeping with the language in *Brown*, also

---

[40] *Gomillion* was anticipated by the "grandfather clause" cases, in which the Court held that states were forbidden from imposing heightened voting qualifications on those who were neither qualified to vote on January 1, 1866, nor the lineal descendants of persons qualified to vote on that date. The obvious intention of the measures was to circumvent the Fifteenth Amendment. See *Guinn v United States*, 238 US 347 (1915); *Lane v Wilson*, 307 US 268, 275 (1939) ("The Amendment nullifies sophisticated as well as simple-minded modes of discrimination.").

[41] For example, in a case in which minority groups challenged congressional districting lines, the Court said that the "crucial" question was whether the lines were "the product of a state contrivance to segregate on the basis of race." *Wright v Rockefeller*, 376 US 52, 58 (1964). See also *Keyes v School District No. 1, Denver, Colo.*, 413 US 189, 208 (1973); *Jefferson v Hackney*, 406 US 535, 548 (1972).

[42] See text at note 20.

[43] See, for example, *Loving v Virginia*, 388 US 1, 11 (1967) (quoted in text at note 14); *Wright v Council of City of Emporia*, 407 US 451, 461 (1972). See also *Allen v Wright*, 468 US 737, 755 (1984) ("[T]he stigmatizing injury often caused by racial discrimination . . . is one of the most serious consequences of discriminatory government action and is sufficient in some circumstances to support standing.").

[44] See cases in note 29.

generally understood that decision to rest on one of the more open-ended conceptions of discrimination: stigma, subordination, second-class citizenship, or the encouragement of private prejudice. Alexander Bickel's defense of *Brown* is representative; he argued that *Brown* rested on the "principle" that the government may not take actions that have the "consequence of . . . plac[ing] one of the groups of which our society is constituted in a position of permanent, humiliating inferiority, when the consequence beyond that is to foster in the whites, by authority of the state, self-damaging and potentially violent feelings of racial superiority."[45]

2. Several post-*Brown* school desegregation decisions suggest (without unequivocally embracing) the far-reaching principle that governments are required to bring about actual integration.[46] The Court repeatedly ruled that school districts that had been segregated by law did not bring themselves into compliance with the Constitution merely by enacting race-neutral measures (for example, a so-called freedom of choice plan). The question, the Court implied, was whether those measures actually brought about racially integrated schools.[47] In a concurring opinion, Justice Powell carried this approach even further by urging that the government had an obligation to ensure actual integration in education,

---

[45] Alexander M. Bickel, *The Least Dangerous Branch* 57 (Bobbs-Merrill, 1962). Many others understood the underlying principle of *Brown* in similar terms. See, for example, Black, 69 Yale L J 421 (cited in note 15); Pollack, 108 U Pa L Rev 1 (cited in note 18); Brest, 90 Harv L Rev at 9 (cited in note 4); Cahn, 30 NYU L Rev at 158-60 (cited in note 18); Archibald Cox, *The Role of Congress in Constitutional Determinations*, 40 U Cin L Rev 199, 209 (1971); *Developments in the Law—Equal Protection*, 82 Harv L Rev 1065, 1127 (1969); Eisenberg, 52 NYU L Rev at 109 n 344 (cited in note 4); Karst, 91 Harv L Rev at 49 (cited in note 15); see also Richard A. Posner, *The Economics of Justice* 355 (Harvard, 1981).

[46] See, for example, *Wright*, 407 US at 462 (citations omitted) ("The mandate of *Brown* . . . was to desegregate schools, and we have said that '[t]he measure of any desegregation plan is its effectiveness.' Thus, we have focused upon the effect—not the purpose or motivation—of a school board's action in determining whether it is a permissible method of dismantling a dual system."); *Green v County School Board*, 391 US 430, 439-42 (1968); id at 442 ("The Board must be required to formulate a new plan and . . . fashion steps which promise realistically to convert promptly to a system without a 'white' school and a 'Negro' school, but just schools.").

These decisions are not unequivocal because they might be seen as limited to the special case of school districts that had once been segregated by law. Or they might be seen as extensions of the *Gomillion* principle, on the theory that the school districts' actions were in fact deliberate efforts to maintain segregation. This is probably the best understanding of *Griffin v School Board*, 377 US 218 (1964), where the school district closed its schools in order to avoid desegregation.

[47] *Green*, 391 US 430 (1968). See also *Wright*, 407 US 451, 460 (1972); *Swann v Board of Education*, 402 US 1, 28 (1971).

whether or not segregation had ever been enforced by law.[48]

The Court's approach in the desegregation cases can probably be best understood as reflecting an expanded notion of second-class citizenship: education is such an important benefit that it must not be distributed in a way that places blacks in a separate and inferior position, even if the criterion used in assigning students to schools is race-neutral and is in no sense a covert use of a racial classification.[49] Alternatively, these opinions might reflect an anti-subordination principle: any measure, no matter why it was adopted, violates the Equal Protection Clause if it places blacks in a racially segregated and inferior position.

3. In *Griggs v Duke Power Co.*,[50] the Supreme Court interpreted Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination in general terms,[51] to prohibit any hiring practice that disqualifies a disproportionate number of blacks unless it is justified by a "business necessity."[52] The Court made it clear that this rule applied even to practices "neutral on their face, and even neutral in terms of intent."[53] While *Griggs* was an interpretation of a statute, not the Equal Protection Clause, nothing obvious in the language or legislative history of Title VII suggested that its general ban on discrimination should be interpreted differently from the Equal Protection Clause.

Accordingly, several decisions by the courts of appeals extended the *Griggs* approach to the Equal Protection Clause. These

---

[48] *Keyes*, 413 US at 217-53 (Powell concurring in part and dissenting in part). For general discussion, see Frank I. Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 Cal L Rev 275, 297 (1972).

[49] As I noted above, in *White v Regester*, 412 US 755 (1973), the Court affirmed a decision invalidating a state's use of multi-member election districts on the ground that they "effectively excluded" minorities from participation in the political process. *White*, 412 US at 765-67. The Court did not insist upon a finding that the decision to adopt multi-member districts was the equivalent of a racial gerrymander; the effect of the districting plan on minorities' political participation was sufficient. The premise of this approach seems to be that the Equal Protection Clause forbids measures that make minorities second-class citizens by sharply reducing their opportunities for political participation.

[50] 401 US 424 (1971).

[51] The Court's decision in *Griggs* was based on the provision of Title VII that makes it "an unlawful employment practice for an employer . . . to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." 42 USC § 2000e-2(a)(2) (1982). See *Griggs*, 401 US at 426 n 1. See also *Nashville Gas Co. v Satty*, 434 US 136 (1977).

[52] 401 US at 431. See also *Dothard v Rawlinson*, 433 US 321, 328-32 (1977). The Supreme Court's recent decision in *Ward's Cove v Atonio*, 109 S Ct 2115 (1989), discussed in note 176, substantially modified the way *Griggs* is to be applied.

[53] *Griggs*, 401 US at 430.

decisions suggested that the government may not adopt a measure that has a harsh impact on racial minorities unless it can provide a strong justification.[54] The *Griggs* approach is probably best understood as an effort to develop a judicially administrable standard that loosely expresses the subordination, stigma, and second-class citizenship conceptions: because a measure that disproportionately burdens blacks has the power to stigmatize or subordinate them in an unacceptable way, such measures are acceptable only if the alternatives impose great costs on the employer or the government.

C. *Washington v Davis* and the Taming of *Brown*

In *Washington v Davis*, the Supreme Court set out to eliminate this uncertainty about the reach of *Brown*.[55] The plaintiffs in *Washington v Davis* challenged a race-neutral testing program for the District of Columbia police force that failed many more blacks than whites. The Court rejected this challenge and ruled that "the basic equal protection principle" is "that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose."[56] Subsequent decisions reaffirmed this holding,[57] and also established that "discriminatory purpose," "discriminatory intent," and "discriminatory motive" are interchangeable terms.[58]

Washington v Davis was significant for two reasons. First, it established that courts could inquire into legislative intent or motive. A great deal of attention had been devoted to this issue.[59] In *Gomillion* itself the Court had strained to avoid using the language of motive or intent. Although *Gomillion* and several other cases seemed explicable only as cases concerning legislative motive or in-

---

[54] The Supreme Court cited, and expressly questioned, a number of these cases in *Washington v Davis*, 426 US at 244-45 & n 12.

[55] The Court did so sua sponte; the petitioners in the case apparently did not challenge the proposition that a standard like that of *Griggs* reflected the correct interpretation of the Equal Protection Clause. See 426 US at 238 & n 8. This, combined with the Court's acknowledgement that its ruling was at least in tension with some of its own decisions and numerous court of appeals precedents, id at 242-45, suggests that the Court was aware of the confusion in the law and decided to clarify it.

[56] *Washington v Davis*, 426 US at 240.

[57] *Village of Arlington Heights v Metropolitan Housing Development Corp.*, 429 US 252, 265 (1977); *Personnel Administrator of Mass. v Feeney*, 442 US 256 (1979); *Hunter v Underwood*, 471 US 222 (1985).

[58] See *Arlington Heights*, 429 US at 265-66; *Hunter v Underwood*, 471 US 222 (1985); *Rogers v Lodge*, 458 US 613 (1982). See also Ely, 79 Yale L J at 1217-21 (cited in note 4).

[59] This was, for example, the central concern of Brest, 1971 S Ct Rev 95 (cited in note 4), and Ely, 79 Yale L J 1205 (cited in note 4). See also Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv L Rev 1, 33 (1959).

tent, the Court continued, from time to time, to disclaim any authority to make such an inquiry. Just four years before *Washington v Davis*, in *Palmer v Thompson*,[60] the Court had refused to entertain a claim that a city violated the Equal Protection Clause by closing its municipal swimming pools in order to avoid desegregation.[61] In *Washington v Davis*, the Court explicitly retreated from its position in *Palmer* that intent was irrelevant.[62]

The more important aspect of *Washington v Davis*, however, was the Court's ruling that the discriminatory intent standard is a *comprehensive* account of what constitutes impermissible discrimination under the Equal Protection Clause. Not only was a showing of discriminatory intent sufficient to establish a violation, it was also (in the absence of an explicit classification) necessary. Explicit classifications aside, *Washington v Davis* held that only actions taken with discriminatory intent violate the Equal Protection Clause. As the Court said in a subsequent case, "[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause."[63]

---

[60] 403 US 217 (1971).

[61] See also *United States v O'Brien*, 391 US 367, 383-84 (1968).

[62] See *Washington v Davis*, 426 US at 242-43. There is a suggestion in *Washington v Davis* that *Palmer* might be distinguished on the ground that it did not involve a measure that had a disproportionate impact on a minority group. See id at 243. On this view, in order to show a violation of the Equal Protection Clause, one would have to demonstrate both discriminatory intent and a disproportionate impact.

The problem with this view is that it is difficult to know what would constitute a disproportionate racial impact. Suppose, for example, that a judge were to adopt a deliberate policy of imposing more severe sentences on black defendants than on otherwise similar white defendants. But suppose it happened that all the black defendants who appeared before this judge had been convicted of less serious crimes, so that overall the sentences imposed on black defendants were not greater that the sentences imposed on whites. It is difficult to identify any disproportionate impact in this case. But there can be no question that the explicit policy of discriminating against blacks is a core violation of the Equal Protection Clause.

[63] *Arlington Heights*, 429 US at 265. *Washington v Davis* and subsequent decisions have not made entirely clear the relationship between the prohibition on discriminatory intent and the principle of strict scrutiny for explicit racial classifications. The best understanding is that if a measure is the product of discriminatory intent, it must be treated in the same way as an explicit classification. That means that in the area of race, the measure is unconstitutional unless the justification is truly extraordinary; in the area of sex, such a measure is somewhat suspect but can be upheld more easily. See *Washington v Davis*, 426 US at 242 (suggesting that the question is whether discriminatory intent or disproportionate impact "trigger[s] the rule . . . that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations."); *Feeney*, 442 US at 273 (emphasis added) ("any state law overtly *or covertly* designed to prefer males over females . . . would require an exceedingly persuasive justification.").

This understanding follows from what I will argue, in section II, is the most plausible definition of discriminatory intent—that discriminatory intent exists if the government has

The claim that the discriminatory intent standard is a comprehensive account of discrimination is, in my view, what makes *Washington v Davis* problematic. There is a category of cases in which the discriminatory intent standard works reasonably well. But in general, as I will argue below, the discriminatory intent standard leads to speculative or meaningless questions. Consequently, if the Court had held that a party can establish a violation of the Equal Protection Clause either by proving discriminatory intent or by showing, perhaps, stigma or subordination, the holding would not be subject to the criticisms I will make in this paper.

The opinion in *Washington v Davis* itself did not make it entirely clear that the discriminatory intent standard was to be a comprehensive approach; the opinion can be read as leaving open the possibility that other conceptions of discrimination might play a role, and as rejecting only the position that a measure is presumptively unconstitutional whenever it adversely affects a disproportionate number of blacks. Subsequent decisions, however, made it clear that the Court had rejected all of the more far-reaching, effects-based conceptions of discrimination—stigma, subordination, second-class citizenship, and the encouragement of prejudice. The sole test (leaving aside explicit classifications) is whether the government acted with discriminatory intent.

The most revealing aspect of the opinions in *Washington v Davis* and its sequelae is the cases the Court cited as examples of impermissible discrimination. Virtually every example the Court gave involved a situation like *Gomillion* or a more subtle version of *Gomillion*: cases in which voting or school district lines were ostensibly neutral but were in fact drawn along racial lines; cases in which the officials in charge of selecting jurors purported to act neutrally but in fact used race as a criterion; and cases in which supposedly neutral voting qualifications were in fact deliberate efforts to disqualify blacks.[64] These are all, in essence, *Gomillion* situations—cases in which the government was using a racial classification but, in contrast to the classic Jim Crow laws of *Strauder* or *Plessy*, was trying to conceal the fact that it was doing so.

---

in fact used race as a criterion, even if it has not done so explicitly.

[64] See *Washington v Davis*, 426 US at 239-40, 243-44; *Arlington Heights*, 429 US at 265-67; *Feeney*, 442 US at 272. The one exception is the mention in *Arlington Heights* of *Reitman v Mulkey*, 387 US 369 (1967) (discussed in note 29 and in text at notes 116-23). See *Arlington Heights*, 429 US at 267. But the *Arlington Heights* Court treated *Reitman* as essentially a *Gomillion* situation—a disguised effort by the government to use a racial classification. The Court made no mention of the language in *Reitman* about encouraging private discrimination.

Moreover, in *Washington v Davis* and the cases that followed it, the Court did not mention (except to limit and distinguish) any of its previous opinions suggesting that the principle of *Brown* extended beyond explicit classifications and *Gomillion* situations.[65] The Court said nothing, for example, about the suggestions in its opinions that race-neutral state action that encouraged private prejudice or excluded blacks from political power would violate the Equal Protection Clause. Nor did the Court refer to the "hearts and minds" language in *Brown*. In other words, the Court recognized that *Brown* cannot be confined to explicit racial classifications; it must extend to the equivalent of racial gerrymanders, subtle or unsubtle. But the Court was unwilling to extend the principle of *Brown* any further.

It is in this sense that *Washington v Davis* tamed *Brown*. The precedents—*Brown*, the cases decided in the two decades after *Brown*, and the antecedents in *Strauder*—all left open the possibility that *Brown* would stand for a principle that mandated relatively far-reaching changes in society.[66] In *Washington v Davis*, the Court closed off that possibility. It returned to what I have called the minimum necessary content of *Brown*: that the Equal Protection Clause prohibits only explicit classifications and the equivalent of racial gerrymanders—facially neutral actions that are in fact based on race.

D. *Washington v Davis* and *Plessy*

Plessy v Ferguson is now universally condemned, and it would be unfair to equate *Washington v Davis* with *Plessy*. But there are several similarities, enough to suggest a more general pattern. Both *Strauder* and *Brown* were associated with eras of great change in American race relations. *Strauder* reflected the new understandings about race relations that developed after the Civil War. *Brown* both reflected and helped shape another set of new understandings, those of the civil rights movement. During Reconstruction and the civil rights era, it was unclear, in both the law and society, how far the changes would go.

Plessy and *Washington v Davis* were both decided after those eras had ended. *Plessy* did not overrule, or even explicitly question, the understandings that developed after the Civil War. *Washington v Davis*, of course, neither overruled nor questioned *Brown*.

---

[65] See note 63.

[66] See Freeman, 62 Minn L Rev at 1049 (cited in note 31).

But *Plessy* adopted the narrowest possible interpretation of the Reconstruction understanding, and *Washington v Davis* adopted the narrowest plausible interpretation of *Brown*. Both decisions dismissed—*Plessy* explicitly, in the notorious passage about "the construction they choose to put on it," and *Washington v Davis* implicitly—the possibility that a notion like opposition to stigma or subordination might be the core of the prohibition against discrimination.

Finally, both decisions made it clear that the Equal Protection Clause would not be used to bring about large-scale changes in society. After *Plessy*, it was clear that the Supreme Court would not be a barrier to entrenching Jim Crow. *Washington v Davis*, to reiterate, did not do anything nearly so bad. But it seems fair to say that *Washington v Davis* also signaled a withdrawal from the front lines of social change. The Court in *Washington v Davis* explained that the alternatives to the discriminatory intent standard "would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white."[67]

Obviously these parallels do not establish that *Washington v Davis* is wrong, much less that it is another *Plessy*. I do not at all want to suggest that the discriminatory intent standard is either as obtuse or as evil as the doctrine of separate but equal. But the parallels may suggest the existence of some systematic process in the law, a process of taming. Great principles are announced in a form that is both vague and potentially far-reaching.[68] Pressure then develops to tame them by reducing them to something that is both apparently more clear and objective, and apparently less threatening to established institutions. The post-Civil War revolution in race relations was tamed by being reduced to separate but equal; that standard emphasized "hard facts" like tangible equality instead of requiring courts to consider vague notions like stigma, and it did not threaten the basic way in which much of society was organized. *Brown* was tamed by being reduced to discriminatory intent, a standard that seems to have the same virtues—it appears to avoid the need to deal with "soft," open-ended notions like stigma, subordination, or second-class citizenship, and it appears not to call a wide range of established institutions into question.

But the consequence of the taming is a degree of infidelity to

---

[67] 426 US at 248 (footnote omitted).

[68] See Benjamin N. Cardozo, *The Nature of the Judicial Process* 51 (Yale, 1921).

the great principle. The principle itself may be relatively vague, and it may threaten many institutions. Understanding what is wrong with discrimination may require some tolerance for relatively vague notions; there is no guarantee that the prohibition against discrimination can be expressed in a way that is not somewhat vague. And there is no guarantee that the principles that underlie that prohibition do not threaten many existing institutions.

In the rest of this paper I will try to analyze the implications of this taming of *Brown*. I will do so by attempting to apply the discriminatory intent standard as seriously and rigorously as possible. I will argue that this tame doctrine is not adequate to the task of analyzing discrimination. The discriminatory intent standard leads either to incoherence or to an inquiry that is no less amorphous, and potentially as threatening to existing institutions, as the rival conceptions of discrimination that *Washington v Davis* rejected.

III. The Definition of Discriminatory Intent

Washington v Davis and subsequent opinions dealing with the discriminatory intent standard discussed in some detail how discriminatory intent can be proved.[69] Oddly, however, the Court has spent almost no time on the question that ought to be answered first: what does "discriminatory intent" mean? The term is hardly self-defining. And using a more rigorous definition instead of a loose, intuitive notion of intent might produce—does produce, as I will try to show—surprising results.

In this section, I will attempt to give a clear definition of discriminatory intent; along the way, I will explain more carefully why I have associated the discriminatory intent standard with the notion of impartiality.

A. The "Reversing the Groups" Test

The definition I propose is as follows. The discriminatory intent standard requires that race play no role in government decisions. That is, the government decision maker must act as if she does not know the race of those affected by the decision; otherwise she violates the discriminatory intent standard. The formula that best captures this definition is what I will call the "reversing the

[69] See, for example, *Washington v Davis*, 426 US at 241-42; *Arlington Heights*, 429 US at 265-68. See generally *Hunter*, 471 US at 228-29; and the various opinions in *Rogers v Lodge*, 458 US 613 (1982), for discussion of the evidentiary issues.

groups" test. A court applying the discriminatory intent standard should ask: suppose the adverse effects of the challenged government decision fell on whites instead of blacks, or on men instead of women. Would the decision have been different? If the answer is yes, then the decision was made with discriminatory intent.[70]

For several reasons, this is, I believe, the only plausible definition of discriminatory intent.[71]

1. As I noted in the last section, it became clear soon after *Brown* was decided that the principle of that decision could not be confined to explicit racial classifications. At the least, measures like that involved in *Gomillion*—cases in which a government uses race covertly in order to do the same thing that it would do with an explicit classification—must be treated in the same way as an explicit racial classification. Otherwise a government could effectively nullify *Brown* by the simple expedient of using racial gerrymanders and their equivalent.

The "reversing the groups" test captures the feature of the *Gomillion* situation that makes it the equivalent of an explicit classification. The problem in the *Gomillion* situation is that the government is in fact taking race into account in the same way (though covertly) as it does when it enacts an explicit classification. What does it mean to say that the government has taken race into account? The best way to express that idea is to apply the reversing the groups test: to ask if the government would have made the same decision even if the races of those affected had been reversed.

That is because if race really made no difference to the government's decision, then, necessarily, the decision would have come out the same if the races of those affected had been reversed. If the decision does not come out the same way when the groups are reversed (and everything else is held constant), then the only possible conclusion is that the decision maker has—in some way, on some level—taken race into account. The decision maker might

---

[70] The consequence of a ruling that a measure reflects discriminatory intent is that it must be treated like an explicit race or gender classification. See note 63.

[71] Definitions proposed in the following places are, I believe, substantially equivalent to this definition. Geoffrey Stone, et al, *Constitutional Law* 556-57 (Little, Brown, 1986); Louis Michael Seidman, *Public Principle and Private Choice: The Uneasy Case for a Boundary Maintenance Theory of Constitutional Law*, 96 Yale L J 1006, 1038-39 (1987); Brest, 90 Harv L Rev at 6-8 (cited in note 4); Eisenberg, 52 NYU L Rev at 117-51 (cited in note 4); Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 Colum L Rev 1689, 1714-15 (1984); Ely, 79 Yale L J at 1266, 1268 (cited in note 4); Note, *The Supreme Court, 1976 Term*, 91 Harv L Rev 70, 174 n 70 (1977).

not have done so consciously, but as I will argue presently, that should not matter. If the government action fails the reversing the groups test, then the decision maker has taken race into account and the decision should be treated in the same way as a decision that explicitly rests on race.

2. The "reversing the groups" approach corresponds with the way discriminatory intent is commonly understood. A person charging an employer with discrimination says: "You wouldn't have rejected that applicant if he had been white (or if she had been a man)" or "you would never have hired that applicant if he had been black (or a woman)." The employer defends itself by insisting that it would have taken exactly the same action if the person adversely affected by its decision had been of a different race or sex. The implicit understanding is that one determines whether an action was taken with discriminatory intent by hypothetically exchanging the group that was adversely affected by it with the group that was benefitted by it.[72]

3. A related point is that, as I have said, the discriminatory intent standard expresses an ideal of impartiality or neutrality. Impartiality is a relative notion, in the sense that one is impartial not in general but with respect to certain characteristics. In the simplest case, an umpire in a game should be impartial with respect to team affiliation, not with respect to, for example, whether a player has committed a foul. A judge should be impartial with respect to which side of the case will promote her personal financial interests, not with respect to the merits of the case.

The "reversing the groups" heuristic is a useful way to test

---

[72] For purposes of my discussion, it is not important to distinguish two questions that current law appears to separate—the question whether discriminatory intent has been "*a* motivating factor" of a decision (or motivated the decision "in part") and the question whether the decision would have been the same in the absence of discriminatory intent. See, for example, *Arlington Heights*, 429 US at 270 n 21. See also *NLRB v Transportation Management Corp.*, 462 US 393 (1983); *Price Waterhouse v Hopkins*, 109 S Ct 1775 (1989).

Both of these questions require the court to make a counterfactual inquiry comparable to the one prescribed by the definition proposed in the text. The first question—whether discriminatory intent was a motivating factor—essentially requires a court to ask whether the claimant would have been viewed more favorably if he or she were not black or a woman. The second question gives the employer (or whomever) a chance to show that even though there was discrimination in that sense, the claimant would not have been viewed more favorably *enough* to receive the benefit in question; therefore the claimant has suffered no redressable harm.

I have defined discriminatory intent in a way that is equivalent to the second question because it is more manageable; it focuses on the decision maker's actual concrete treatment of the claimant, rather than on the decision maker's opinion of the claimant. But the points I make are equally applicable to both questions.

whether an umpire has been impartial: one asks whether the umpire would have made the same decision if the players' team affiliations had been reversed. If the answer is no, the umpire has not been impartial. Parallel reasoning applies to governments. The discriminatory intent standard requires governments to be neutral or impartial, in this familiar sense, among racial groups and between men and women. The underlying premise of the discriminatory intent standard is that race and gender are corrupting factors, factors that properly should not influence a governmental decision, except in extraordinary circumstances.[73]

B. The Alternatives

There appear to be two other possible definitions of discriminatory intent, and neither seems even minimally plausible.

---

[73] This understanding of the discriminatory intent standard does not entail either support for or opposition to the constitutionality of affirmative action, that is, race- or sex-conscious measures designed to aid disadvantaged groups. It does entail the position that affirmative action can be defended only as an exception to the usual prohibition against discrimination. But that belief is widely held among both supporters and opponents of affirmative action, and it is the firmly established position of the Supreme Court. See, for example, *City of Richmond v Croson*, 109 S Ct 706 (1989); *Wygant v Jackson Board of Education*, 476 US 267, 274 (1986) (plurality opinion); id at 286-87 (O'Connor concurring); *Regents of the University of California v Bakke*, 438 US 265, 289-305 (1978) (opinion of Powell); id at 357-362 (Brennan concurring in part and dissenting in part). Among the commentators opposing affirmative action, see, for example, Alexander M. Bickel, *The Morality of Consent* 133-34 (Yale, 1975); Morris B. Abram, *Affirmative Action: Fair Shakers and Social Engineers*, 99 Harv L Rev 1312 (1986); William Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U Chi L Rev 775 (1979). Among those supporting it, see, for example, John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U Chi L Rev 723, 723-24 (1974); Terrance Sandalow, *Racial Preferences in Higher Education: Political Responsibility and the Judicial Role*, 42 U Chi L Rev 653, 654-55 (1975); Kent Greenawalt, *Judicial Scrutiny of "Benign" Racial Preference in Law School Admissions*, 75 Colum L Rev 559 (1975); Brest, 90 Harv L Rev at 1-2, 16-23 (cited in note 4). My own view is that this premise, common to supporters and opponents of affirmative action, is mistaken, and that affirmative action and nondiscrimination are more similar than distinct. See Strauss, 1986 S Ct Rev 99 (cited in note 22). My view entails rejecting the discriminatory intent standard as a comprehensive account of discrimination.

The "reversing the groups" definition permits one to argue either that affirmative action is an acceptable departure from the usual requirement of nondiscrimination—a permissible form of partiality—or that affirmative action is unconstitutional because no exception to the usual requirement of impartiality is justified. That is the way the arguments for and against affirmative action are usually made. The fact that the "reversing the groups" test identifies the common ground in the affirmative action debate, while permitting either conclusion on the constitutionality of affirmative action, further supports the conclusion that it is the most plausible definition of discriminatory intent.

1. Conscious discriminatory intent.

Unconscious bias, including unconscious race or gender bias, is not a mysterious thing; it may even be more common today than conscious bias.[74] Unconscious bias exists when a person honestly believes that he is treating blacks and whites alike but is in fact treating them differently. Such discrimination can be proved either by statistical evidence or by evidence such as offhand comments, even if the actor continues sincerely to believe that he does not discriminate.[75]

The "reversing the groups" test reaches both conscious and unconscious discrimination. It asks what the decision maker would have done in different circumstances. It does not matter whether the decision maker was aware that he would have acted differently had he been dealing with people of a different race or sex.

This kind of counterfactual inquiry might be criticized as just too far-reaching and unwieldy. The discriminatory intent standard, it might be argued, should reach only cases—like *Gomillion* and other cases of deliberate evasion—where a decision maker has consciously decided to treat blacks differently from whites, or women differently from men.

There are several problems with this view. First, while conscious discrimination is morally more objectionable on a number of grounds, if one is concerned about impermissible *partiality*, there is no reason to confine the inquiry to conscious partiality.[76] A judge or umpire who is unconsciously biased is no more impartial than one who is deliberately abusing his or her authority.[77]

---

[74] See Brest, 90 Harv L Rev at 6-8 (cited in note 4). For a discussion of unconscious racial bias, see Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 Stan L Rev 317 (1987); and id at 339-44 (reviewing empirical evidence). For a discussion of unconscious gender bias, including empirical sources that suggest its prevalence, see Becker, 1987 S Ct Rev at 209 & nn 29, 30 (cited in note 15).

[75] See generally *Namenwirth v Board of Regents*, 769 F2d 1235 (7th Cir 1985); *Jayasinghe v Bethlehem Steel Corp.*, 760 F2d 132 (7th Cir 1985); *EEOC v Inland Marine Industries*, 729 F2d 1229 (9th Cir 1984).

[76] See Brest, 90 Harv L Rev at 7-8 (cited in note 4); Lawrence, 39 Stan L Rev at 345-49 (cited in note 74).

[77] In fact, there are rules designed to protect against the possibility that a judge will, for example, be unconsciously biased in favor of her personal financial or other interests. The Supreme Court has repeatedly ruled that a judge may violate the Due Process Clause by ruling in a case in which he or she has a financial interest even if there is no showing of actual bias. The issue is whether the judge's circumstances "would offer a possible temptation to the average [person] as a judge . . . or might lead him not to hold the balance nice, clear, and true." *Tumey v Ohio*, 273 US 510, 532 (1927). See, for example, *Ward v Village of Monroeville*, 409 US 57, 60 (1972); *Aetna Life Ins. Co. v Lavoie*, 475 US 813, 825 (1986); *Liljeberg v Health Services Acquisition Corp.*, 108 S Ct 2194, 2205 n 12 (1988).

Second, it is a mistake to assume that a standard that distinguishes between conscious and unconscious discriminatory intent will be more manageable than one that treats the two alike. There is no clear line, either conceptually or practically, between conscious and unconscious bias. There are different levels of consciousness, and different circumstances under which people become conscious of the nature of their actions. Many people who discriminate would not admit that discrimination is a good practice. They do not luxuriate in the fact that they are treating blacks and whites or men and women differently, and they are likely to resist the accusation when it is made.[78] Limiting the discriminatory intent standard to conscious discrimination in effect forces an inquiry not just into whether an action fails the "reversing the groups" test, but into the self-awareness of the actor. That inquiry is likely to be far more complicated and mysterious than anything mandated by a straightforward version of the "reversing the groups" test.

Third, limiting the discriminatory intent standard to conscious discrimination creates an incentive for people not to become conscious of what they are doing. Given that an action fails the "reversing the groups" test, the effect of importing a requirement of conscious discrimination is to make the lawfulness of the action depend entirely on the actor's willingness to consider the possibility that he or she might be discriminating. That result seems obviously incorrect.

Finally, the simple "reversing the groups" test works for collective decision makers as well as for individuals; limiting the discriminatory intent standard to conscious discrimination forfeits this important virtue. The "reversing the groups" test asks a question about the decision making process: would that process have produced the same result if the races or sexes of those affected had been reversed? It does not matter how many steps or people the decision making process comprises.[79]

A definition based on conscious bias, however, requires that individual decision makers be identified. One can decide whether a

---

[78] See Lawrence, 39 Stan L Rev at 340 (cited in note 74).

[79] This corresponds with the way the discriminatory intent standard is administered in the area in which it is most commonly used—"disparate treatment" employment discrimination actions under Title VII. Many employment decisions are made by collective bodies—hiring committees, boards of directors, partnerships, faculties. While the discriminatory intent standard has its difficulties in employment cases (as I will discuss), the courts do not seem to find it systematically more difficult to deal with collective than with individual decision makers.

decision making process satisfies the "reversing the groups" test. But it is difficult to make sense of the question whether a process is "conscious" of its discrimination. One can ask that question only about individuals. A definition that focuses on the process instead of on the individuals seems far preferable.

One could certainly argue that conscious discrimination is worse than unconscious discrimination in certain ways; it is generally more disrespectful and insulting to the victim, for example. Similarly, obvious and unsubtle discrimination, which is more likely to be (and to be found to be) conscious, is probably more stigmatizing and subordinating. But this argument does not justify confining the discriminatory intent standard to conscious discrimination. Rather, it suggests that the discriminatory intent standard does not tell the whole story and should be supplemented by one of the alternatives that considers effects. That is because the argument that conscious or obvious discrimination is especially debilitating is an argument about the effects of government actions, not about the intent or process that produced them. If this argument is correct, what follows is that any action that has the same effects as obvious discrimination—the same insulting, stigmatizing, or subordinating effects—should also be unconstitutional. As I said in discussing the alternative conceptions of discrimination, there is no reason to believe that the class of actions with those effects is limited to overt and covert racial classifications. Depending on how the crucial psychological effect is defined, race-neutral measures that leave blacks in an inferior position may be equally harmful.

2. Malice.

Discriminatory intent could also be defined, even more narrowly, to involve a desire to inflict harm on the disadvantaged group. This approach would equate discriminatory intent with malice, using "malice" in a non-technical sense to mean wishing ill towards another. (A feels malice toward B if, all other things equal, A would prefer a state of affairs in which B is worse off to one in which B is better off.) As a matter of language, this interpretation seems odd; the relevant intent is the intent to discriminate, not the intent to harm. "Discriminate" has something to do with differentiating, and the reversing the groups test seems to capture the idea of an intent to differentiate.[80]

---

[80] In *Personnel Administrator v Feeney*, 442 US 256 (1979) (discussed in section IV. A.

The malice definition is difficult to defend in other respects as well. The "reversing the groups" approach expresses an ideal of impartiality; it rests on the premise that race and sex should not influence government decisions. Race and sex are corrupting factors, like personal financial interest. That is a coherent and plausible view.

The premise of the malice approach is much less plausible. It is that the government is free to undervalue the interests of a class of citizens, to treat them with indifference, to ignore the burdens it imposes on them, so long as it does so in order to achieve an objective other than injuring the group. No matter how little weight the government accords to the interest of a class of its citizens, it acts properly so long as it does not set out to inflict injury on them.

---

below), the Court appeared to offer a definition of discriminatory intent (or "purpose"; the Court now uses the terms interchangeably) that equated discriminatory intent with malice. But the Court's language in *Feeney* is in fact subject to more than one interpretation. In the course of its discussion, the Court said:

> "Discriminatory purpose," . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decision maker . . . selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group.

Id at 279 (footnotes and citation omitted).

Probably the most natural reading of this passage is that the decision maker has acted with discriminatory intent only if it considered the fact that the statute harmed women to be a desirable feature. And much of the Court's analysis of the discriminatory intent question suggests that it equated discriminatory intent with malice. See id at 279-80.

But this passage can be read to support the "reversing the groups" test. The crucial language in the opinion is " 'because of' . . . its adverse effects upon an identifiable group." This phrase is ambiguous. It might mean that the decision maker adopted the measure because the effects upon women were adverse; that would equate discriminatory intent and malice. But the quoted language might also mean that the decision maker adopted the measure because the adverse effects of the statute fell on women instead of on men. That supports the "reversing the groups" test.

In addition, as a matter of precedent, *Feeney* need not be read to preclude the "reversing the groups" definition. The principal issue in *Feeney* was not between the "reversing the groups" test and the malice approach, but rather whether a "foreseeable effects" definition of intent is correct: that is, whether Massachusetts was guilty of intentional discrimination because it could foresee the disproportionate effect of the statute. That was what the party challenging the preference argued (see Brief for the Appellee, *Personnel Administrator v Feeney*, No 78-233, at 31-37) and when the Court announced the definition quoted in the text, it was rejecting the foreseeability view, not the "reversing the groups" approach. See 442 US at 278-80.

Moreover, the Court in *Feeney* acknowledged that a facially-neutral "covert" classification—"a classification that is ostensibly neutral but is an obvious pretext for racial discrimination"—would be unconstitutional "regardless of purported motivation" and even if no "antipathy" were shown. Id at 272. The court put *Gomillion* in this category. My argument is that the crucial feature of cases like *Gomillion* is that they fail the "reversing the groups" test. For this reason as well, *Feeney* need not be read to preclude the "reversing the groups" definition.

There is no apparent reason for adopting so limited a view of the class of government actions that the Equal Protection Clause forbids.[81]

But the decisive argument against the "malice" approach is that it cannot account even for the core case like *Brown* or *Gomillion*. Jim Crow is invariably unconstitutional, but it is not obvious that the architects of Jim Crow invariably desired to hurt blacks.[82] Some of them may have sincerely desired only to promote social stability and the harmonious development of both races. Some may have sincerely believed that segregation aided blacks. Or they may have recognized its harmful effects but considered them a regrettable byproduct of a system that was the best for society as a whole. The extent to which segregationists held these views is, of course, a matter of speculation, but even if (as seems likely) they did hold such views in some cases, segregation would still be unconstitutional.

The equivalent of Jim Crow in the area of sex discrimination provides an even better example. Much overt discrimination against women was probably promoted by people who had no desire, consciously at least, to hurt women. Many people thought (many still think) that women enjoy being relegated to their traditional roles. Others may have recognized that women were hurt but considered that to be an unfortunate byproduct of a generally desirable system. Since we cannot assume that overt and covert segregation and discrimination against blacks and women always reflect a desire to harm them, the "malice" definition of discriminatory intent will not always condemn even the kinds of statutes invalidated in *Brown* and *Gomillion*.

C. The Employment Discrimination Analogy

At least two common kinds of employment discrimination litigation illustrate how the "reversing the groups" test operates and show that the counterfactual inquiry required by that test is not somehow too bizarre to be a plausible definition of discriminatory intent.[83] First, in many cases a challenged employment decision is

---

[81] See generally Seidman, 96 Yale L J at 1038 (cited in note 71); Brest, 90 Harv L Rev at 7-8 (cited in note 4).

[82] See Bickel, *Least Dangerous Branch* at 61-62 (cited in note 45); Strauss, 1986 S Ct Rev at 115-16 (cited in note 22).

[83] These cases arise under the "disparate treatment" standard of Title VII. It seems reasonably clear that the Title VII disparate treatment standard, and the *Washington v Davis* discriminatory intent standard, are equivalent. See generally *General Electric Co. v Gilbert*, 429 US 125, 133-37 (1976). On the disparate treatment standard, see, for example,

part of a series of decisions based on relatively determinate criteria. Plaintiffs in such cases try to show through statistics that the employer's purported criteria do not in fact account for the pattern of the employer's decisions and that the decisions can be explained, to a high degree of probability, only on the basis of race or sex. Although the statistical analysis is often difficult, this approach reflects a straightforward application of the "reversing the groups" test: the question is whether the employer would have reached the same decision if the race or sex of the employees had been different. Neither malice nor consciousness of bias plays any role.[84]

Second, when the challenged decision is more isolated, as in a promotion decision, a court will generally compare the qualifications of the employee who was hired or promoted with the qualifications of the employee who was passed over to see if the difference in treatment is attributable to race or sex. This, too, is an application of the "reversing the groups" test: the question is whether the employer would have treated an applicant with these qualifications in the same way if he or she had not been a black or a woman.[85] Therefore, in this context as well, the "reversing the groups" test is capable of being applied to actual decisions.

For all these reasons, the "reversing the groups" test is the best available definition of discriminatory intent. It makes sense a priori; there are significant categories of cases in which its application is essentially straightforward; and there appears to be no other plausible account of discriminatory intent.

IV. Applying the Discriminatory Intent Standard

In this section, I will attempt to apply the discriminatory intent standard, defined in the way I have just discussed, to two especially difficult and controversial problems: the so-called state action issue, and measures that in some sense classify on the basis of pregnancy or the capacity to become pregnant. Laws restricting

---

International Brotherhood of Teamsters v United States, 431 US 324, 335 n 15 (1977).

[84] See generally *Teamsters v United States*, 431 US at 324, 334-43. For useful discussion, see Douglas Laycock, *Statistical Proof and Theories of Discrimination*, 49 L & Contemp Probs 97, 98-105 (Autumn, 1986).

[85] See, for example, *Wu v Thomas*, 847 F2d 1480 (11th Cir 1988); *Emanuel v Marsh*, 828 F2d 438 (8th Cir 1987); *Namenwirth v Board of Regents*, 769 F2d 1235 (7th Cir 1985); *Rohde v K.O. Steel Castings, Inc.*, 649 F2d 317 (5th Cir 1981); *Holder v Old Ben Coal Co.*, 618 F2d 1198 (7th Cir 1980). On the limits of this approach, see Deborah L. Rhode, *Perspectives on Professional Women*, 40 Stan L Rev 1163, 1193-95 (1988). See also section IV.E. below.

abortion are the most controversial example in the second category. I will then generalize to other, less controversial areas.

Ordinarily one would examine the simplest areas first and then move to the more complex and controversial. I am proceeding in the opposite way for several reasons. First, these areas (which I will call for convenience "state action" and "pregnancy discrimination") are important tests for the soundness of any principle that claims, as the discriminatory intent standard does, to be a comprehensive account of what constitutes impermissible discrimination under the Equal Protection Clause. As I will argue below, an account of discrimination that cannot satisfactorily deal with these problems is not acceptable as a comprehensive account.

Second, applying the discriminatory intent standard to these areas illuminates the fundamental weakness of the discriminatory intent standard especially well. Once that weakness is identified, it is easier to see why the discriminatory intent standard is also an inadequate way of dealing with the simpler, more conventional problems.

Finally, applying the discriminatory intent standard to the problems of state action and pregnancy discrimination sheds new light on those particular problems. These are notoriously difficult areas of constitutional law. No analysis has dealt with them in a fully satisfactory way.[86] But carefully applying the discriminatory intent standard to these areas will, I believe, substantially clarify the issues they present. In particular, it will provide a better answer than has so far been provided to those who say that the leading cases in these areas—*Shelley v Kraemer* and *Roe v Wade*—are wrong.

A. Discriminatory Intent and State Action: The Problem

1. The issue in the "state action" cases.

Shelley v Kraemer is generally acknowledged to be the most interesting and problematic of the so-called state action cases.[87] It presents in especially pure form a problem that arises in a number of cases involving the government's relationship to private discrim-

---

[86] See, for example, Charles L. Black, Jr., *Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 Harv L Rev 69, 95 (1967) (describing state action as "a conceptual disaster area").

[87] See, for example, Stone, et al, *Constitutional Law* at 1491 (cited in note 71) (*Shelley* "is widely regarded as one of the most controversial and problematical decisions in all of constitutional law."); Laurence H. Tribe, *Constitutional Choices* 259 (Harvard, 1985) ("the most problematic and controversial of the state action cases").

ination. After I show how the discriminatory intent approach applies to *Shelley*, I will generalize it to the overall problem of government responses to private prejudice.

a. In *Shelley*, state courts enjoined black persons from occupying property they had purchased on the ground that the property was subject to a covenant prohibiting occupancy by non-whites. The Supreme Court concluded that the injunctions violated the Equal Protection Clause. The Court said that because the Fourteenth Amendment applies only to "such action as may fairly be said to be that of the States," the restrictive covenants alone did not violate the Equal Protection Clause.[88] But action by state courts is state action, the Court reasoned; and the judicial enforcement of the private racially restrictive agreements constituted racial discrimination in violation of the Fourteenth Amendment.[89]

Shelley was an easy target for critics. They usually viewed it as the clearest lesson of the perils of judicial activism: the Court tried to strike a blow against a morally offensive practice, but it had no legal foundation for doing so, and as a result its decision cannot be defended in principled doctrinal terms.[90] The typical argument about *Shelley*'s unsoundness was along these lines:[91] Suppose A, acting out of racial prejudice toward B, refuses to invite B to a social event at A's house. B enters the house anyway. A sues in trespass. *Shelley* is hard to distinguish; if *Shelley* controls, A loses. That seems to be an unacceptable result. The problem with *Shelley*, according to its critics, is that it failed to see that the only discrimination in the case was private discrimination. It is true that the state courts aided the private discrimination in some way. But state courts applying the traditional common law rules unavoidably further private discrimination in innumerable incidental ways. All of these common law decisions cannot be unconstitutional, and there is no principled way of distinguishing the case of restrictive covenants.

Washington v Davis reorients the analysis of the issues in *Shelley*, but at first glance it seems to reinforce the position of *Shelley*'s critics.[92] Under the discriminatory intent standard, the

---

[88] 334 US at 13.

[89] Id at 19, 20-21.

[90] See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, in *Principles, Politics, and Fundamental Law* 3, 21-27, 40-41 (Harvard, 1961).

[91] Id at 40-41; see also Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind L J 1, 15-17 (1971).

[92] For attempts to defend *Shelley* that antedate *Washington v Davis*, see, for example, Louis Henkin, Shelley v Kraemer: *Notes for a Revised Opinion*, 110 U Pa L Rev 473 (1962);

description of *Shelley* and kindred cases as "state action" cases is misleading. The state is acting in *Shelley* and in all of the so-called state action cases. The state is enforcing a restrictive covenant, ejecting an uninvited guest, renting space in a public building,[93] granting a liquor license,[94] or disabling its legislature from enacting open housing legislation.[95]

Indeed, in every case the state is doing *something*. In most cases thought to involve only private action and state "inaction," the state is at least enforcing the common law background of property and tort law that makes private transactions possible. Thus there is no such thing as a case in which there is no state action. This does not, however, mean that the state action limitation of the Fourteenth Amendment is nullified. The state action limitation prescribes that courts may scrutinize, under the Equal Protection Clause, only the precise action—however limited—that the state has taken. If the state has only enforced the common law rules that permitted a private discriminatory transaction to take place, then the question is whether *that* state action violates the Equal Protection Clause.

Accordingly, under the discriminatory intent test, the question in the "state action" cases is no longer whether the state is acting but whether the state's action—whatever it is—is tainted by discriminatory intent.[96] While private discrimination always takes place against a background of state action, the state is not liable unless *its* actions were taken with discriminatory intent—no matter how discriminatory the private beneficiaries of the state's action might be, and no matter how much the state's action (or inaction) benefits the discriminatory private parties.

This approach seems to lead to the conclusion that *Shelley* is wrong. In *Shelley* all the state was doing was enforcing a common law rule against the breach of covenants. Enforcing that rule is undoubtedly state action, but it seems to be nondiscriminatory state action. How can an ancient common law rule be the product of racial prejudice? Surely the history of the rule demonstrates that it

---

Pollak, 108 U Pa L Rev at 6 (cited in note 18); Thomas P. Lewis, *The Meaning of State Action*, 60 Colum L Rev 1083, 1108-20 (1960). See also Black, 81 Harv L Rev at 94-95 (cited in note 86).

[93] *Burton v Wilmington Parking Authority*, 365 US 715 (1961).

[94] *Moose Lodge No. 107 v Irvis*, 407 US 163 (1972).

[95] *Reitman v Mulkey*, 387 US 369 (1967); *Hunter v Erickson*, 393 US 385 (1969).

[96] See, for example, Stone, et al, *Constitutional Law* at 1492 (cited in note 71); Tribe, *American Constitutional Law* 1714-15 (cited in note 4); Ely, 79 Yale L J at 1296 n 273 (cited in note 4).

was adopted without any regard to race.

One possible answer—a kind of selective enforcement argument—is that there really is no general common law rule requiring the enforcement of restrictive covenants. In fact, the common law has always been somewhat hostile to such provisions.[97] If Missouri did not generally enforce restrictive covenants at the time of *Shelley*, one might argue that the state's action in *Shelley* was discriminatory because the state was more hospitable to racially restrictive covenants than to other kinds of restrictive covenants.[98]

But this selective enforcement argument is not a satisfactory theoretical justification of *Shelley*. The argument makes *Shelley* contingent: it implicitly concedes that *Shelley* would not be correct in any state that happened to enforce all, or most, restrictive covenants. The holding of *Shelley* is not limited in this way, and the moral appeal of the result in *Shelley*—which even its opponents concede—would be very strong even in a state that enforced all restrictive covenants.

More important, why should a state that enforces racially restrictive covenants be found guilty of racial discrimination just because it does not enforce certain other restrictive covenants?[99] Suppose, for example, that a state refused to enforce those restraints on alienation that limit the mobility of title to land in a way that damages the economy,[100] and that racial restrictions, as a matter of fact, do not have a significantly deleterious effect on the economy. That appears to be a neutral, nondiscriminatory justification for enforcing racially restrictive covenants while refusing to enforce some other restrictive covenants. Thus, even in a state that refuses to enforce many restrictive covenants, the selective enforcement argument might not support the result in *Shelley*.

b. The problem with the selective enforcement argument is one that it shares with the traditional criticism of *Shelley*. Both approaches ask whether the state is acting neutrally in applying the common law rules about restrictive covenants. The traditional argument sees nothing non-neutral about the common law. The selective enforcement argument says that, as it happened, Missouri applied the common law rules in a non-neutral way. But the selec-

---

[97] See *Restatement of Property* § 406 (1944).

[98] This argument is made in Tribe, *Constitutional Choices* at 260 (cited in note 87).

[99] See Stone, et al, *Constitutional Law* at 1492 (cited in note 72) ("As long as Missouri classifies *some* other nonracial restrictive covenants as consistent with public policy, aren't its rules neutral on their face?") (emphasis added).

[100] On the effects of restraints on alienation, see Susan Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 Colum L Rev 931, 933-35 (1985).

tive enforcement argument is defeated in any state in which restrictive covenants are enforced either across the board or according to apparently neutral criteria, such as the absence of a severe economic effect.

The flaw that both of these approaches share is that they see only one of the two sides to *Shelley*. If *Shelley* is analyzed under the discriminatory intent standard, the question is not only whether the state is acting neutrally with respect to restrictive covenants. The question is also whether the state is acting neutrally with respect to private racial discrimination.

When a state decides whether to enforce a discriminatory private covenant, it considers the evils of private discrimination, as well as the benefits of enforcing agreements. Rigorously applied, the discriminatory intent standard—interpreted, as I explained in the last section, as a requirement of neutrality or impartiality—asks: if a nondiscriminatory state considered both of those factors, and gave the proper (that is, nondiscriminatory) weight to each, would that state enforce the racially restrictive covenant? The answer might be negative even if every other restrictive covenant is enforced.

More concretely, under the discriminatory intent standard, the party challenging the restrictive covenant in *Shelley* could make the following argument: An act of private discrimination by a white against a black in America inflicts great harm, both material and psychological. Few legal private acts inflict more harm. State enforcement of private discrimination both increases the psychological and material harms and encourages additional harmful private discrimination in the future.

The only reason the state tolerates these serious injuries—the argument would continue—is that they fall on blacks. The state would never allow harms of that severity to fall on whites. In particular, the state would not allow burdens of that magnitude to fall on whites if it could avoid them by abrogating blacks' property and contract rights to a limited extent. Therefore, the argument would conclude, under the "reversing the groups" test, *Shelley* is correct.

Unlike the selective enforcement argument, this argument can be made even if every other form of restrictive covenant is enforced. For it is entirely plausible that state-enforced private racial discrimination in housing causes more harm than the enforcement of any non-racial restrictive covenants. Even if a state values restrictive covenants so highly that it enforces them in all other circumstances, the evil of discrimination may be so peculiarly great that the state would—if that evil fell on whites instead of on

blacks—conclude that it outweighed the benefits of enforcing covenants (especially if those benefits accrued only to blacks). If that contention is correct, then *Shelley* is correct under a discriminatory intent test no matter what a state does with other restrictive covenants.

Suppose, for example, that a flood devastated a black residential area; the authorities responsible for emergency aid denied assistance; and the residents claimed that the authorities had acted with discriminatory intent. It is clear what the question should be, not only under the impartiality model but according to commonsense understandings: would white flood victims have received emergency aid in these circumstances? *Shelley* is analogous, except that in *Shelley* blacks were injured by private discrimination, not by a flood. The question was whether the government had discriminatorily denied the resources needed to mitigate those injuries, where the "resources" would be the costs incurred by refusing to enforce certain private agreements.

One cannot answer this argument by saying that Missouri enforced restrictive racial covenants against whites as well as blacks. An act of discrimination by a black against a white person inflicts harm, but the harms are not of the same order of magnitude as those inflicted by discrimination by a white against a black person; or at least there is no reason automatically to conclude that the harms are of the same magnitude. The differences in the size of the two groups and in their economic and social status, as well as the history of relations between blacks and whites in this country, all ensure that the injuries inflicted by whites' discrimination against blacks differ greatly, in nature and magnitude, from the injuries inflicted by blacks' discrimination against whites. Of course, if Missouri enforced restrictive racial covenants only against blacks and not against whites, its discrimination would be blatant. But simply because Missouri was willing to subject whites to the relatively limited harm done by blacks' discriminatory acts (if there were any) does not by any means show that Missouri would subject whites to harms comparable to those that blacks suffer from private racial discrimination.

2. The problems of speculativeness and incoherence.

Therefore, under the discriminatory intent standard, the question in *Shelley* is whether Missouri would take an action that has as harmful an effect on whites as the enforcement of racially restrictive covenants has on blacks. The submission of the black purchasers is that the state would not tolerate anything that had as

damaging an effect on its white citizens as the enforcement of private racial discrimination has on blacks. The discriminatory intent standard requires that a court decide whether that submission is correct.[101]

My own sense is that that submission is correct, and that no state would tolerate an institution that inflicted as much harm on whites as state-enforced private discrimination inflicts on blacks. But it would be difficult to persuade a skeptic that that intuition is correct. And it is not clear how a court would go about resolving the issue.

If there were some other practice ("A") that we could somehow determine was exactly as damaging—in both nature and magnitude—as state enforcement of private discrimination, and some practice ("B") that was exactly as damaging as the denial of property and privacy rights effected by *Shelley*, then a court could ask: would Missouri be willing to inflict A on whites in order to avoid inflicting B on blacks? But it seems impossible to identify either an A or a B. In particular, it seems impossible to define any institution, other than discrimination itself, that one could say with confidence damages people in precisely the way that racial discrimination does.

It therefore appears that the only way to apply the discriminatory intent standard with perfect rigor is hypothetically to reverse the groups within the same factual situation. The question would be whether Missouri would enforce against whites a private racially discriminatory practice *just like* the kind of racial discrimination that was enforced against blacks.

In constructing this hypothetical question, it is important not to omit any aspect of private discrimination against blacks. One would have to suppose, of course, that whites were the minority; discrimination by a majority against a minority cannot automatically be equated with the reverse. One would have to suppose further that this minority of whites had been victims of racial dis-

---

[101] Again, it might be suggested that this argument is an attack on the state action requirement of the Fourteenth Amendment, or is a suggestion that the state action requirement is itself discriminatory or non-neutral. That suggestion is mistaken. I take the state action requirement as a given: I assume that the Equal Protection Clause prohibits only discriminatory state action.

But among the state actions to which the antidiscrimination norm applies are state actions with respect to private discrimination. In deciding what to do about private discrimination, the state must act impartially. The failure to do anything about private discrimination is not necessarily impartial. It depends on whether the state would have done something about a condition that inflicted injuries of comparable magnitude on whites.

crimination as widespread as the discrimination that is practiced against blacks. One would have to suppose that blacks had the social and economic position that whites now have, and that whites had the same position that blacks now have: discrimination by the weak against the strong is not equivalent to discrimination by the strong against the weak. Finally, one would have to suppose that blacks had enslaved whites, enforced White Codes, engaged in systematic racial violence against whites with the acquiescence of government authorities, practiced Jim Crow (or whatever it would be called) against whites, and so on; for the historical context significantly affects the magnitude and nature of the harm that private prejudice inflicts on a group.

In short, if one rigorously applies the discriminatory intent standard to *Shelley*, the question is essentially: suppose the entire situation of blacks and whites in America had been reversed; suppose blacks had done everything to whites that in fact whites did to blacks. Now suppose that blacks entered into a restrictive racial covenant. Would Missouri enforce it?

The first thing one notices about this question is that any answer would be highly speculative. In section II, I described the kinds of hypothetical questions that the discriminatory intent standard might pose in certain employment discrimination cases—such as whether an employer would have treated an equally well-qualified black or female employee in the same way as it treated a white or male, and whether race and sex explained a pattern in an employer's decisions. Those questions will often be difficult to answer, but they are appropriate questions for a court to ask. The difficulties they pose are evidentiary, and the evidence needed to answer those questions would be available at least sometimes.

The question that the discriminatory intent standard dictates in *Shelley v Kraemer*—whether restrictive racial covenants would be enforced if whites, not blacks, had been the principal victims of discrimination throughout history—has neither of these attributes. No court, in theory or practice, has the ability to gather the evidence needed to answer questions about what would have happened if the situation of blacks and whites in the United States had been reversed. Not only is that question beyond the reach of the courts; it is beyond the reach of everyone. No branch of natural or social science would claim to be able to answer that question. The difficulties that the discriminatory intent standard presents in this context are of a different order of magnitude from the difficulties it presents in contexts like employment. In order to apply the

discriminatory intent standard to a case like *Shelley*, the court must engage in almost pure speculation about a rather bizarre hypothetical case.

There is even another level to the difficulties, beyond the speculative nature of the inquiry that the discriminatory intent test requires. The problem in applying the discriminatory intent standard to *Shelley* is not just that no one (including a court) can possibly answer the question it poses—the question whether restrictive covenants would be enforced if whites, not blacks, had always been the principal victims of discrimination in the United States. There is a conceptual problem as well: in an important sense, that question may be meaningless. It may be meaningless because being a long-term victim of discrimination may be part of what it *means* to be black in the United States.

Membership in an ethnic group is not simply a matter of skin color or other inherited physical characteristics. Defining membership in an ethnic group—like identifying the characteristics that give rise to racial or ethnic prejudice—is an exceptionally difficult task. In some circumstances, at least, social position plays a role.[102]

Being in the status of a historic victim of discrimination is, in all likelihood, one of the characteristics that define black Americans. It is possible to imagine, as in the employment discrimination cases I described earlier, a white person who has the same job credentials as a black. But it is probably impossible to imagine a white American who is a member of a group that has historically been subject to prejudiced treatment of the kind and degree accorded to blacks. This is not to deny that various groups of whites have been victims of discrimination, and it is not to take a position on who has been treated worse. The point is that once we try to imagine a person subjected to the kind and magnitude of discrimination that has been inflicted on black Americans, we are imagining a black American. The inquiry breaks down the normal categories of black and white: to ask how a state would react to racial covenants if whites, instead of blacks, had been the principal vic-

---

[102] See, for example, Gordon W. Allport, *The Nature of Prejudice* 116-23 (Doubleday, 1958); Pierre L. van den Berghe, *The Ethnic Phenomenon* 137-56 (Elsevier, 1981); Edna Bonacich, *A Theory of Middleman Minorities*, 38 Am Sociol Rev 583 (1973). See also Winthrop D. Jordan, *White Over Black* 97-98 (U NC, 1968) ("[I]t seems likely that the colonists' initial sense of difference from the Negro was founded not on a single characteristic but on a congeries of qualities which, taken as a whole, seemed to set the Negro apart. . . . The available evidence (what little there is) suggests that for Englishmen settling in America, the specific religious difference was initially of greater importance than color . . . .").

tims of discrimination throughout history is to ask what would have happened if whites were not whites and blacks were not blacks. The problem is not just that the question requires speculation beyond the bounds of any natural or social science; the problem is that the question does not make any sense.

* * *

It is important to recognize that there is no way out of these conundrums so long as the discriminatory intent standard is the comprehensive account of discrimination. That standard must be defined along the lines of the "reversing the groups" test; no other definition captures the problem the Court was addressing, which is to reach cases where race in fact entered into the government's decision. Once discriminatory intent is defined in that way, the problems with *Shelley* follow. That definition of discriminatory intent forces us to ask whether the state would have tolerated a condition that harmed whites as much as racially restrictive covenants harmed blacks. And that question in turn leads to the problems of speculativeness and possible meaninglessness or incoherence I have just described.

In the next pages I will explain more about the extent of this problem and I will suggest some possible practical solutions. But for now there are two clear lessons. First, so far as the so-called state action issue is concerned, it is a mistake to say that *Shelley* is clearly wrong, or that it is doctrinally unsound because the Court disregarded the law and simply reached what it considered a morally correct outcome. *Shelley* is probably not wrong under the discriminatory intent standard, if that standard is applied rigorously. The doctrinal problem is the result of inadequacies in our understanding of what constitutes discrimination.

The second lesson is that the discriminatory intent standard is not a satisfactory comprehensive account of discrimination. It asks speculative and possibly incoherent questions—inquiries that are at least as open-ended as they would be under the standards that the Court rejected in *Washington v Davis*.

B. The Scope of the Problem in "State Action" Cases

Shelley presents in a pure form the difficulty that is at the root of several other notoriously problematic "state action" cases. Some of these cases are thought to present the dilemma conventionally seen in *Shelley*: the morally desirable result appears to be inconsistent with the legally sound result. In other cases, it is sim-

ply unclear how the problem should be analyzed.

Each of these cases presents the same underlying question as *Shelley*, that is, whether the government responded to private prejudice in a nondiscriminatory way. The reason the cases are problematic is that when discrimination is defined as discriminatory intent or impermissible partiality, that question leads to speculativeness and arguable incoherence.

1. Enforcement of trespass laws in aid of private discrimination.

The sit-in cases of the early 1960s are the example most like *Shelley*.[103] In each of these cases, demonstrators were prosecuted under state trespass laws after they refused to leave private, racially segregated restaurants. The cases arose before the enactment of Title II of the Civil Rights Act of 1964, which prohibited racial discrimination in public accommodations. The question was whether the trespass convictions violated the Equal Protection Clause. The issue parallels *Shelley*: a facially neutral state rule, rooted in the common law, was being used to enforce private discriminatory preferences.

The sit-in cases, to an even greater extent than *Shelley*, are thought to present the dilemma that the morally right result was legally unsound. Upholding the convictions would have appeared to endorse private segregation. Invalidating the convictions would, it was thought, have committed the Court to the implausible conclusion that a state may never enforce property rights in a way that would protect a citizen's racially discriminatory choices, even in the most private activities.[104] The Supreme Court's response was to reverse each of the convictions on some other ground—for example, that state law required discrimination, or that the state trespass laws had been superseded or were vague or discriminatorily enforced—without reaching the question whether the state enforcement of private discrimination violated the Equal Protection Clause.[105]

---

[103] For example, *Hamm v City of Rock Hill*, 379 US 306 (1964); *Bouie v City of Columbia*, 378 US 347 (1964); *Bell v Maryland*, 378 US 226 (1964); *Robinson v Florida*, 378 US 153 (1964); *Barr v City of Columbia*, 378 US 146 (1964); *Griffin v Maryland*, 378 US 130 (1964); *Avent v North Carolina*, 373 US 375 (1963); *Gober v City of Birmingham*, 373 US 374 (1963); *Lombard v Louisiana*, 373 US 267 (1963); *Peterson v Greenville*, 373 US 244 (1963).

[104] See, for example, *Bell v Maryland*, 378 US 226, 327-28 (1964) (Black dissenting); Archibald Cox, *The Warren Court* 31-41 (Harvard, 1968) (describing the dilemma).

[105] See Monrad G. Paulsen, *The Sit-In Cases of 1964: "But Answer There Came*

In fact, these cases, like *Shelley*, do not present a choice between the legally correct and the morally right decision; they just present a legal question that is difficult to analyze under the impartiality model. The question in the sit-in cases is: suppose some private practice inflicted on whites the kind of burdens and hardships that segregation in public accommodations inflicts on blacks. Would the state create an exception to its trespass laws in order to alleviate those hardships? More precisely, would it create such an exception if it could impose the cost of creating the exception principally on blacks?

If the answer is yes—if the state would make an exception to its trespass laws in those hypothetically reversed circumstances—then the failure to create an exception in the sit-in cases is discrimination. And, of course, it is state discrimination. While the state did not decide to exclude blacks from the lunch counters, it did decide to enforce its trespass laws without creating an exception for this case. If that state decision does not satisfy the "reversing the groups" test, it violates the discriminatory intent standard.

How can a court determine whether the decision to enforce state trespass laws in this case was impartial in the sense required by the "reversing the groups" test? In the actual sit-in cases, the courts could have examined the nature of the hardships that private discrimination produces—both the tangible burdens, such as the difficulty of travelling or of finding a place to eat near work or home, and the intangible losses like humiliation and emotional distress. In addition, the courts could have examined the other circumstances (for example, necessity and certain public emergencies) in which the states limited property rights or made exceptions to their trespass laws. In that way, the courts could have acquired some sense of the values on both sides of the ledger—the harm of private discrimination and the benefits, from the state's point of view, of enforcing property rights. This might have provided a basis for deciding whether the refusal to create an exception came about because of the race of those involved. But obviously the problems of speculativeness remain.

None," 1964 S Ct Rev 137; Thomas P. Lewis, *The Sit-in Cases: Great Expectations*, 1963 S Ct Rev 101. Individual justices expressed views on the underlying issues, however; see, especially, the exchange between Justices Goldberg and Black in *Bell v Maryland*, 378 US 226 (1964); id at 286-318 (Goldberg concurring); id at 326-43 (Black dissenting).

2. Public benefits: Leases and licenses.

In *Burton v Wilmington Parking Authority*,[106] a restaurant that leased space in a parking garage owned by a state agency refused to serve black customers. In *Moose Lodge No. 107 v Irvis*,[107] a private club that held a state liquor license discriminated on the basis of race. In each case, the Court examined the relationship between the government agency and the private establishment and determined whether the relationship was close enough that the establishment could be treated as an arm of the state. The Court reached a different answer in each case.[108]

But even if the Court had assumed that the discriminatory actions of the restaurant or club could not be attributed to the state, the Court should still have faced the *Shelley* question: did the state take a non-discriminatory approach to acts of private discrimination? The Court would have had to decide whether the decisions to lease space to the restaurant and to license the club—decisions that were undoubtedly made by the state—were discriminatory. Under the "reversing the groups" test, the question in *Burton* is whether the state would lease space to restaurants that inflicted on whites injuries comparable to those that private racial discrimination inflicts on blacks. In *Moose Lodge*, it is whether the state would have denied a liquor license to a club that engaged in a practice that is as harmful to whites as racial discrimination is to blacks. In answering those questions, the Court would have faced the same difficulties of speculativeness and possible incoherence that are presented by *Shelley* and the sit-in cases.

Again there might have been a way to reach a reasonable judgment. In *Burton*, the Court could have examined the circumstances under which the state refused to lease space to enterprises. For example, the state would presumably refuse to lease to firms that were bad credit risks, had previously breached the terms of their lease, created health hazards, violated the criminal laws, or, possibly, engaged in legal but unsavory activities or competed with the state in some way. In *Moose Lodge*, the Court would have to investigate the other criteria that the state used in awarding liquor licenses. As in the sit-in cases, the Court would also have to arrive at a sense of how burdensome private discrimination in establish-

---

[106] 365 US 715 (1961).

[107] 407 US 163 (1972).

[108] In *Burton*, the Court ultimately held that the restaurant was a state actor; in *Moose Lodge*, it held that the club was not. See *Burton*, 365 US at 724; *Moose Lodge*, 407 US at 177-79.

ments of this kind is for blacks. The more burdensome discrimination is, and the more departures the state made from the practice of leasing space to all firms and licensing all applicants, the stronger the inference that the decision to grant the lease or license to the discriminator was not impartial.

3. Public benefits: Aid to private discrimination.

Norwood v Harrison[109] is the leading example of another group of cases that presents the *Shelley* problem.[110] A Mississippi state agency, using facially neutral criteria, lent textbooks to both public and private schools. Some of the recipient private schools engaged in overt racial discrimination. The program had been in existence since 1940, and the Court did not suggest that the program was a pretext to aid private schools that were established to thwart desegregation decrees.[111]

The Court nonetheless held that the program violated the Equal Protection Clause. It concluded that a "State's constitutional obligation requires it to steer clear . . . of giving significant aid to institutions that practice racial or other invidious discrimination."[112] Not only are the implications of *Norwood* unclear—elsewhere in the opinion the Court distinguished between textbooks and " 'electricity, water, and police and fire protection' "[113]—but the decision is difficult to square with *Washington v Davis*, which was decided three years later. The Mississippi program was certainly not an obvious violation of the discriminatory intent standard; it used neutral criteria, and it was established at a time when discriminatory intent in any obvious sense could not have been the motivation. The Court even stated: " 'The existence of a permissible purpose cannot sustain an action that has an impermissible effect.' "[114] But the Court has cited *Norwood* with approval since *Washington v Davis*, and there seems to be little like-

---

[109] 413 US 455 (1973).

[110] Essentially the same issue is raised by *Gilmore v City of Montgomery*, 417 US 556 (1974); *National Black Police Association v Velde*, 712 F2d 569 (DC Cir 1983); *Percy v Brennan*, 384 F Supp 800, 811-12 (S D NY 1977); *Byrd v Local Union No. 24, IBEW*, 375 F Supp 545, 559-60 (D Md 1974); *McGlotten v Connally*, 338 F Supp 448 (D DC 1972); *James v Ogilvie*, 310 F Supp 661 (N D Ill 1970); *Ethridge v Rhodes*, 268 F Supp 83 (S D Ohio 1967).

[111] The Court did "not assume that the State's textbook aid to private schools has been motivated by other than a sincere interest in the educational welfare of all Mississippi children." *Norwood*, 413 US at 466.

[112] Id at 467.

[113] Id at 465, quoting *Moose Lodge No. 107 v Irvis*, 407 US 163, 173 (1972).

[114] Id at 466, quoting *Wright v Council of City of Emporia*, 407 US 451, 462 (1972).

lihood that the Court would consider overruling it.[115]

Norwood is difficult to reconcile with the discriminatory intent standard because *Norwood* implicates the *Shelley* problem. Under the discriminatory intent standard, the question in *Norwood* is whether the harm caused by segregated private schools was sufficiently great that an impartial state—a state that took harm inflicted on black citizens as seriously as harm inflicted on whites—would make an exception to the general textbook program. The Court's decision is certainly a plausible resolution of that issue. But the problems of speculativeness and possible incoherence are apparent. Again, the reason *Norwood* is problematic is not that the morally desirable result—cutting off aid to the segregation academies—conflicts with "the law" of *Washington v Davis*; it is that the principle of *Washington v Davis*—the discriminatory intent standard—is so difficult to apply to the *Norwood* problem.

4. Repeal of civil rights legislation.

A fourth group of cases comprises *Reitman v Mulkey*,[116] *Hunter v Erickson*,[117] *Washington v Seattle School District No. 1*,[118] and *Crawford v Board of Education*.[119] There are differences among these cases, but all have the same basic structure. In each, a government took some measure to combat either private racial discrimination or its effects. In *Reitman* and *Hunter* the measure was an open housing law; in *Seattle* and *Crawford*, it was a program to reduce de facto school segregation. The Court assumed that these measures were not constitutionally required.[120] Each of the cases arose because of popular referenda that both repealed the pro-civil

---

[115] See, for example, *Bob Jones University v United States*, 461 US 574, 593-94, 604 n 29 (1983).

[116] 387 US 369 (1967).

[117] 393 US 385 (1969).

[118] 458 US 457 (1982).

[119] 458 US 527 (1982).

[120] Logically there is no reason why a party could not claim that a particular state's failure to enact civil rights legislation is the product of discriminatory intent. The argument would be that the state does enact, or would enact, legislation to prevent injuries comparable to those of private racial discrimination from being inflicted on white citizens. Of course, a refusal to enact civil rights legislation would not necessarily be discriminatory; legislators might have nondiscriminatory reasons for opposing such measures. And even if the refusal to enact a civil rights law were discriminatory, a court might find it difficult to fashion a remedy. But as far as the constitutional requirement is concerned, there is nothing illogical about saying that in some circumstances a failure to extend affirmative protection to a minority may be the result of discriminatory intent.

No such case has ever come before the Supreme Court; the closest approximations are the cases I discuss in the text of this article.

rights measures and amended the state constitutions (or, in one case, the city charter) to prohibit such measures in the future. The claim in each case was that the referendum violated the Equal Protection Clause.

The Court rejected the Equal Protection Clause claim in *Crawford*; it upheld it in all the other cases. The opinions do not seem to articulate a uniform or satisfactory approach, and their reasoning has been widely criticized.[121] It may be possible to design a principle that reconciles these decisions or analyzes them in a plausible way.[122] But the root of the difficulty in these cases is that they implicate the *Shelley* problem.

In each case, the voters in the referendum decided that it was not worth incurring some burden (spending money, inconveniencing the schoolchildren who were bussed, restricting people's ability to dispose of their property as they saw fit, incurring enforcement costs) in order to combat housing discrimination or de facto segregation. In each case, the Court had to decide whether the voters' decision was nondiscriminatory.

Under the discriminatory intent standard, the question is: suppose there were conditions that inflicted on whites injuries comparable to those that housing discrimination and de facto segregation inflict on blacks; and suppose there were measures that mitigated those injuries, but that imposed (perhaps disproportionately on blacks)[123] burdens comparable to those imposed by busing and open housing laws. Would those measures have been repealed? And would they have been repealed in a way that disables the legislature ever reinstituting them? Those questions present problems of speculativeness and possible incoherence, although again there might be a way for a court to reach a reasonable conclusion: it could examine the circumstances under which a state is unwilling to bus students, restrict property rights, and so on; and it could examine the instances in which the state affirmatively disables its legislature from making those choices.

---

[121] See, for example, Stone, et al, *Constitutional Law* at 576-78 (cited in note 71); Alexander Bickel, *The Supreme Court and the Idea of Progress* 65-70 (Yale, 1970); Cox, *The Warren Court* (cited in note 104); Kenneth L. Karst & Harold W. Horowitz, Reitman v. Mulkey: *A Telophase of Substantive Equal Protection*, 1967 S Ct Rev 39, 55.

[122] See, for example, Black, 81 Harv L Rev at 82 (cited in note 86); Cass R. Sunstein, *Public Values, Private Interests, and the Equal Protection Clause*, 1982 S Ct Rev 127, 158.

[123] It is unclear whether the burdens of the busing and open housing measures would have fallen disproportionately on whites.

5. State recognition of private discrimination.

In a different way, cases like *Watson v Memphis*[124] and *Palmore v Sidoti*[125] also implicate the *Shelley* problem.[126] In both of those cases, private prejudice threatened to bring about some unquestionably harmful consequence, and the government used an explicit racial classification in order to avert that consequence. In *Watson*, Memphis delayed the desegregation of its public parks and recreational facilities on the ground that integration would lead to "interracial disturbances, violence, riots, and community confusion and turmoil."[127] In *Palmore*, a Florida court deprived a divorced white mother of custody of her child when she remarried a black man; the court reasoned that the child of an interracial couple was "sure" to "suffer from . . . social stigmatization."[128]

In both cases, the Supreme Court invalidated the government's action. One possible basis for the decisions is that the Court did not accept the empirical judgments on which they were based—the judgment that fights would break out in the Memphis parks, or that the child would suffer psychological damage if raised in an interracial family. But in neither case was the Court's opinion explicitly based on this ground. And the opinion in *Palmore* (although not the opinion in *Watson*) explicitly declined to take issue with that empirical judgment.[129]

If the empirical judgments were correct, the Supreme Court's decisions in these cases become at least somewhat troubling. The Court has ordered that the states must inflict certain injuries on innocent citizens—the child in *Palmore* and innocent victims of violence in *Watson*. What is the justification for that? The Court explained in *Palmore* that the Florida court's decision violated the Equal Protection Clause because "the law cannot, directly or indirectly, give . . . effect" to "[p]rivate biases."[130] In other words, violence, or psychological harm to the child, was the price that the

---

[124] 373 US 526 (1963).

[125] 466 US 429 (1984).

[126] See also *Wright v Georgia*, 373 US 284, 293 (1963); *Palmer v Thompson*, 403 US 217, 255-61 (1971) (White dissenting); Ely, 79 Yale L J at 1296 n 273 (cited in note 4).

[127] *Watson*, 373 US at 535.

[128] Opinion of the Circuit Court of Hillsborough County, in Petition for a Writ of Certiorari at 26-27, *Palmore v Sidoti*, No 82-1734.

[129] See *Palmore*, 466 US at 433 ("It would ignore reality to suggest that racial and ethnic prejudices do not exist or that all manifestations of those prejudices have been eliminated. There is a risk that a child living with a step-parent of a different race may be subject to a variety of pressures and stresses not present if the child were living with parents of the same racial or ethnic origin.").

[130] Id at 433.

state had to pay in order to avoid reinforcing and encouraging private prejudice. The reason the cases should be a little troubling is that it is not clear on what basis the Court decided this. How did the Court determine that the Constitution requires governments to pay that price in order to combat private prejudice and its effects?

This is, at bottom, the *Shelley* problem: what burdens would an impartial, nondiscriminatory state incur in order to combat private prejudice? In *Watson* and *Palmore*, the problem has a different twist, because the challenged state action was explicitly based on race. In *Shelley*, as in all of the other cases I have discussed so far, the state policies were neutral on their face. That difference may be significant for a number of reasons. But if discrimination is defined by the discriminatory intent standard, then the Court in *Watson* and *Palmore*, as in *Shelley*, must have concluded that a nondiscriminatory state would incur some genuine costs—violence, psychological harm, nonenforcement of private agreements—in order to combat private prejudice. It is difficult to know whether this conclusion was right in any of these cases. The question of what level of costs a nondiscriminatory state must incur to combat prejudice implicates all the problems of speculativeness and incoherence that I identified in connection with *Shelley*.

C. State Action and Discriminatory Intent: Some Solutions

In sum, then, the discriminatory intent test, when applied to *Shelley* and many other "state action" cases, requires a court to ask a question that, at best, calls for speculation. At worst, the question is incoherent. What should a court do in this situation? There are three possibilities. A court might reason that because there is no fully rational, non-speculative way to resolve the case, the burden of proof will be decisive; the party with the burden will lose. Alternatively, the court might decide to do the best it can with whatever evidence might be helpful, recognizing the speculative nature of the decision. In the last section, I sketched how the courts might do this; here I will develop those ideas more fully. Finally, the court might decide that the problem is the discriminatory intent standard itself. Because that standard leads to a speculative and possibly meaningless question in important categories of cases, it should not be the comprehensive Equal Protection Clause standard.

1. Making the burden of proof decisive.

Allowing the burden of proof to be decisive in cases like *Shel-*

ley is of course an option. The problem is that it is an enormously costly option. If the burden of proof is decisive, then either the plaintiff (by which I mean the party claiming that the state action is unconstitutional) always wins, or the plaintiff always loses. Under current law it would be the latter.[131]

If the plaintiff always won, the government would be required to do literally everything it could, short of violating other constitutional rights, to eradicate private discrimination. As long as some private discrimination persisted, the government would have to shift resources from another area to combat it. Saying that the Equal Protection Clause requires the government to do that is implausible.

But the opposite rule is also unacceptable. If the discriminatory intent standard governs and the burden of proof is on the plaintiff, the effect of making the burden of proof decisive is to guarantee that the government will always win in "state action" cases, at least so long as the government has not done something blatantly discriminatory. This means that the government (so long as it is subtle) is free to engage in racial discrimination throughout the large and important area of government responses to private prejudice. The racially discriminatory action by the government will take the form of not devoting the proper amount of resources to combatting private prejudice, where the "proper" amount means the amount that would be devoted to combatting something that affected whites in the same way.

Any approach that insulates an important category of discriminatory government action from review in this way is prima facie unacceptable. It should be adopted only if the alternatives are extremely undesirable. Equal protection of the laws surely includes equal protection provided by the state against private prejudice. Government discrimination is a constitutionally unacceptable evil whether it takes the form of a discriminatory refusal to hire, a discriminatory school assignment, a discriminatory refusal to aid the victims of flood damage, or a discriminatory refusal to combat private prejudice. A court would not adopt an approach that precluded all victims of school segregation or government employment discrimination from ever obtaining relief in court, unless all the alternatives to that approach were highly unacceptable. Making the burden of proof decisive in cases like *Shelley* bars recovery for all victims of another form of government discrimination, the dis-

[131] *Village of Arlington Heights v Metropolitan Housing Development Corp.*, 429 US 252, 270 & n 21 (1977).

criminatory refusal to devote public resources to combatting private prejudice.

Moreover, there is no reason to believe that the claims of plaintiffs in "state action" cases like *Shelley* are more likely to be meritless than there is to believe that of any other class of plaintiffs claiming racial discrimination. If anything, the opposite is more likely to be true. The "state action" cases arise only when there is at least some private discrimination. In most of the cases that have arisen, the private discrimination has been widespread. If there is widespread private discrimination, there is good reason to suspect government discrimination, as well: individuals who discriminate in their private capacities are likely to elect representatives who discriminate.

In fact, an approach that combines the discriminatory intent standard with a rule that the burden of proof on the plaintiff is decisive should not be viewed as an allocation of the risk of nonpersuasion at all. It is more appropriately seen as a decision to treat the "state action" issue as a political question. The courts will know before any evidence is introduced, in every case alleging a (nonobvious) discriminatory response to private prejudice, that the claim must be dismissed. Analytically and practically, this is equivalent to saying that any such claim presents a nonjusticiable political question. The political processes will have the last word, and those processes will have to police themselves against the danger of this kind of discrimination.

But such a claim—that a state government has allowed blacks to suffer the effects of private prejudice because it is biased against them—should be among the last candidates to be left to the political branches. The Equal Protection Clause reflects an unmistakable determination that state legislatures are not to be trusted to refrain from engaging in racial discrimination. The drafters of that provision were clear in their intention to establish some means to police state action to ensure that it is not discriminatory. State political processes were not to have the last word on the question whether they were discriminating on the basis of race.

Prominent among the state action that the drafters of the Equal Protection Clause wanted to outlaw were state failures to protect minorities against the actions of private parties.[132] The

---

[132] In *The Slaughter-House Cases*, 83 US (16 Wall) 36 (1872), the Court declared that "the one pervading purpose" of the Thirteenth, Fourteenth, and Fifteenth Amendments was "the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freedman and citizen from the oppressions of those who had

words "equal protection of the laws" themselves suggest that a principal focus is protection against private acts. Even those who favor a narrow reading of the Fourteenth Amendment acknowledge that a central concern of the Framers of the Amendment was to ensure that the states would extend the protection of the civil and criminal laws—that is, protection against private conduct—to blacks on the same terms as whites.[133]

The "state action" problem, as I have described it, is no different in principle. The question is whether various public resources have been made available to blacks and whites on equal terms. Everyone would agree that police protection and access to the courts must be made available to blacks on the same terms as whites. But "protection" includes more than just access to the courts and police protection. It includes everything the state affords—or would afford—to whites. If an exemption from the operation of a certain common law rule would be available to whites in certain circumstances, it must be available to blacks in the same circumstances. If something as costly as an exemption from restrictive covenants would be available to whites if they were faced with something as oppressive as private racial discrimination in housing, then an exemption from restrictive racial covenants must be available to blacks.

In sum, equal protection by the state against the depredations of private parties was a core concern of the Fourteenth Amendment. *Shelley* and the other so-called state action cases I have discussed involve claims to that kind of equal protection. Consequently, any approach that would effectively give the state political processes the last word on issues like those involved in *Shelley*, including an approach that would make the burden of proof decisive, does violence to a central purpose of the Fourteenth Amendment. Perhaps at the end of the day such an approach will turn out to be the best we can do. But the alternatives will have to be exceedingly unattractive before one can justifiably reach that conclusion.

---

formerly exercised unlimited dominion over him." The Schurz report, detailing private acts of violence against blacks in the South, played an important role in the debates that led to the Civil Rights Act of 1866, and ultimately to the Fourteenth Amendment. See Robert J. Harris, *The Quest for Equality* 40-41 (LSU, 1960). The 1866 Act required that all citizens be afforded "equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens." 14 Stat 27 (1866). See generally Frank and Munro, 1972 Wash U L Q at 468-472 (cited in note 25).

[133] See, for example, Berger, *Government by Judiciary* at 169-76 (cited in note 25).

2. Muddling through.

I suggested one possible alternative in my discussion of the other "state action" cases: the courts might try to muddle through under the intent test, even with all of its problems. The courts might try as best they can to determine whether the state was devoting insufficient resources to combatting private racial discrimination—"insufficient" meaning, of course, less than would be devoted if whites were the victims of an equally harmful practice. This approach has the problems I described above: it requires the courts to ask a speculative and possibly meaningless question. But since the most obvious alternative—to treat the issue in *Shelley* as one would treat a political question—is so unattractive, it is worth investigating just how amorphous the inquiry would be if the courts did the best they could with the discriminatory intent standard.

If the courts do try to apply that standard, the analysis I have followed has the important practical consequence of significantly expanding the range of evidence that courts ought to consider in deciding cases like *Shelley*. Currently, the "state action" cases focus on two kinds of evidence: evidence of inconsistencies in the government's action, such as a willingness to bus for certain purposes but not for the purpose of integrating the schools;[134] and evidence about the strength of the interests the government advances to justify its refusal to act against private discrimination.[135] These kinds of evidence would continue to be relevant if a court were doing the best it could to apply the discriminatory intent standard. If the government's actions reveal that it does not consider busing to be a great burden, that suggests that the failure to bus for integration is discriminatory; if the government's refusal to combat private discrimination is justified by an exceptionally strong interest, there is more reason to believe that it would refuse to combat something that had comparable effects on whites.

But there is another side to the ledger, and the courts have not customarily considered it in "state action" cases. Under the discriminatory intent standard, the court should also consider evidence tending to show how damaging private discrimination is. In *Shelley* and *Reitman* the courts should consider evidence about how damaging residential segregation is, and about the extent to

---

[134] See *Washington v Seattle School District No. 1*, 458 US 457, 471-74 (1982). This is the essence of the "selective enforcement" approach to *Shelley*. See text at notes 97-100.

[135] See, for example, *Crawford v Los Angeles Board of Education*, 458 US 527, 543 (1982).

which restrictive covenants or discrimination in selling cause segregation.[136] In *Seattle* and *Crawford* they should consider how damaging de facto school segregation is. In *Burton* and *Moose Lodge* they should consider the burdens imposed on blacks by discrimination in public accommodations and in large-membership private clubs.

The courts should consider evidence of this kind because the discriminatory intent standard requires a court to decide whether the state would have sacrificed certain interests—in privacy and property, in ease of administration, in avoiding the expense and disruption of busing—in order to combat something that affects whites in the way that private discrimination affects blacks. A court cannot begin to answer that question unless it gets a sense of how discrimination affects blacks. The resulting inquiry is obviously sprawling and speculative. It leaves an enormous amount to the judge's intuitions. But the choice is not between this kind of speculative inquiry and a perfect world; so far, it is only a choice between the speculative inquiry and a burden of proof approach that does violence to important constitutional values. Given that choice, this kind of comprehensive review—of the evils of private discrimination, the costs of combatting it, and the other circumstances in which the state has incurred such costs—might easily be the better option.

3. Seeking an alternative.

The other possibility is to use something other than the intent test—a different conception of discrimination—in cases like *Shelley*. Before *Washington v Davis*, the Supreme Court often analyzed these cases by assessing whether the state had encouraged private prejudice to an unacceptable extent.[137] In addition, strong arguments can be made that enforcing racially restrictive covenants subordinates blacks, and that permitting racial discrimination in private buildings on public property is stigmatizing.

The problem with these approaches, of course, is that they are vague. Determining the degree to which the government may encourage private discrimination is likely to involve an open-ended balancing; and defining a test for when a government action imposes a stigma or subordinates a group would not be easy. But the

---

[136] Restrictive covenants, for example, were prevalent in the years before *Shelley*. See President's Commission on Civil Rights, *To Secure These Rights* 68-70 (Simon & Schuster, 1937).

[137] See note 29.

fact that these approaches are vague is not a sufficient reason for dismissing them. As I have argued, the intent test also dictates a vague, speculative, amorphous inquiry—arguably an incoherent inquiry—in an important category of cases.

I began the discussion of *Shelley* with the traditional view, exemplified by Herbert Wechsler's famous essay on "neutral principles," that *Shelley* is an example of unprincipled judicial activism.[138] My consideration of the state action problem yields, I believe, two lessons about that view. First, the central theme of the neutral principles essay, and of much constitutional debate since then, is that unless a court can devise an "entirely principled" explanation for its action it ought not act; it ought to defer to the political processes.[139] This view is premised, at least implicitly, on the notion that vague doctrine, being less than "entirely principled," is of questionable legitimacy, and that if the courts cannot do better than vague doctrine they are duty-bound to let the political branches decide.

This view is misconceived. Undue deference is a problem, too. Other things equal, vague doctrine is of course undesirable. There is a danger that courts administering the stigma or subordination approaches, for example, will overreach and infringe the prerogatives of the other branches. But those dangers have to be weighed against the dangers of the alternative courses of action. There is no reason to believe that they outweigh the damage that would be inflicted on the constitutional order by the burden of proof or political question approach, which would effectively immunize all but the most obvious state discrimination in this area.

Second, the traditional view holds that doctrine becomes unprincipled when courts try to do too much, when they are moved by their sense of moral right and wrong to try to correct social problems that should be left to the other branches. This was a recurrent theme in criticism of the Warren Court. A principal lesson of my discussion of the state action problem, however, is the opposite: that doctrine can become incoherent when courts try to do too little, when they are too eager to leave problems to the other branches. In *Washington v Davis* the Court adopted a standard that was more restrained, less likely to cause the courts to invalidate the actions of the other branches. The consequence of adopting that tame doctrine was incoherence—the incoherence I have described in the state action area, and that is replicated in the ar-

---

[138] See text at notes 90-91.

[139] See Wechsler, 73 Harv L Rev at 19 (cited in note 59).

eas I will consider next. A conception of discrimination that was less tame, that included elements of the effects-based approaches, would provide a more satisfactory way of analyzing these issues. The problematic character of *Shelley* is the result not of judicial activism but of the impoverished conception of discrimination that is reflected in the intent test.

D. Pregnancy Discrimination and the Discriminatory Intent Standard

1. Abortion and sex discrimination.

In *Roe v Wade*,[140] the Supreme Court held that the Constitution guarantees women the right to an abortion in certain circumstances. When *Roe* was decided, the current equal protection law of sex discrimination was in its earliest stages,[141] and *Roe* was, of course, decided on the basis of the right of privacy, a substantive due process right. The Supreme Court has continued to view the abortion issue in that way: when it considers the constitutionality of a measure restricting abortion, it decides whether that measure impermissibly infringes the right to privacy.[142]

But it is also possible to argue that laws restricting abortion violate the Equal Protection Clause because they impermissibly discriminate against women on the basis of sex.[143] The class of people immediately adversely affected by an anti-abortion law consists

---

[140] 410 US 113 (1973). In order to discount for possible bias, the reader should know that I filed a brief amicus curiae on behalf of the National Coalition Against Domestic Violence in *Webster v Reproductive Health Services*, 109 S Ct 3040 (1989), arguing that laws forbidding abortion are inconsistent with the Equal Protection Clause.

[141] *Reed v Reed*, 404 US 71 (1971), the first Supreme Court case that seemed to apply heightened scrutiny to a classification based on sex, was decided on November 22, 1971, six months after the Supreme Court noted probable jurisdiction in *Roe*. See 402 US 941 (May 3, 1971). By contrast, at the time *Roe* was before the Court, the substantive due process right to privacy in matters of family life and procreation was well established. See *Eisenstadt v Baird*, 405 US 438 (1972), citing with approval *Griswold v Connecticut*, 381 US 479 (1965). It is therefore not surprising that *Roe* was argued primarily as a substantive due process case, not as a sex discrimination case. For a discussion of the (very limited) extent to which a sex discrimination argument was made in the briefs, see Catharine A. MacKinnon, *Feminism Unmodified* 250-51 (Harvard, 1987).

[142] See, for example, *Thornburgh v American College of Obstetricians and Gynecologists*, 476 US 747 (1986); *City of Akron v Akron Center for Reproductive Health, Inc.*, 462 US 416 (1983).

[143] This argument is often made in the literature, but so far it seems not to have had any effect in the courts. For leading statements of the argument, see MacKinnon, *Feminism Unmodified* at 93-102 (cited in note 141); Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 NC L Rev 375 (1985); Karst, 91 Harv L Rev at 57-59 (cited in note 15).

entirely of women. Indeed, by its terms the law applies exclusively to people who possess a characteristic—the ability to become pregnant—that only women have. Those considerations alone do not establish that restrictions on abortion impermissibly discriminate against women, but they at least suggest that the sex discrimination arguments deserve a careful hearing.

If abortion laws violate the Equal Protection Clause, they would be unconstitutional no matter what one thinks of substantive due process. In addition, the sex discrimination approach seems superior to the substantive due process approach in several respects.

First, it has been a central tenet of post-New Deal constitutional theory that courts are better suited to review government acts for impermissible discrimination than to second-guess the political branches in the way that substantive due process review requires.[144] The current state of the debate about *Roe*—in which substantive due process is the mainstream approach used by the courts, and equal protection is considered the more novel approach—is therefore a curious, and anachronistic, inversion of the usual understanding of the two clauses.

Perhaps more important, analyzing *Roe* as a sex discrimination case seems to capture aspects of the political debate about abortion that are slighted by the substantive due process approach. Critics of restrictive abortion legislation often see the issue in terms of the rights and status of women. Much of the opposition to laws restricting abortion stems from the perception that such measures limit women's aspirations and their ability to control their lives and locks them into a caste-like position—the child-bearing and child-rearing caste.[145] These arguments have a much greater affinity to Equal Protection Clause doctrine than to the right of privacy.

In addition, treating *Roe* as a case involving the right of privacy has the effect of immediately plunging the courts into the most difficult and wrenching question, the question of the moral status of the fetus (or the unborn child; I do not intend to beg any questions by the choice of terms). This question is one of the most

---

[144] This is the central theme of Ely, *Democracy and Distrust* (cited in note 26), and also of Justice Jackson in *Railway Express Agency, Inc. v New York*, 336 US 106, 112-13 (1949) (Jackson concurring). See also Gerald Gunther, *Foreword: In Search of Evolving Doctrine on A Changing Court: A Model for a Newer Equal Protection*, 86 Harv L Rev 1, 41-43 (1972).

[145] See, for example, Kristin Luker, *Abortion and the Politics of Motherhood* 92-125 (U Cal, 1985).

difficult questions of moral philosophy, not in the sense that it is close to the line, although it may be, but in the sense that there is nothing like an agreed-upon approach to the issue. A substantive rights approach to *Roe* necessarily requires the courts to "balance" the rights that are invaded against the governmental interests at stake. Since the principal government interest is the protection of the fetus, the courts are immediately forced to confront that issue.

If *Roe* is analyzed as a discrimination case, it is theoretically possible to avoid answering this question. Under the Equal Protection Clause, however strong the government's interest in protecting fetal life, the government cannot pursue that interest in a way that impermissibly discriminates against women; however weak that government interest, it is free to pursue it in a nondiscriminatory fashion. Even if abortion is homicide, the state may not prohibit women from committing homicide in certain circumstances if men are allowed to do an act equivalent to homicide in equivalent circumstances.[146] In this way, the Equal Protection Clause at least makes it theoretically possible to argue coherently against laws restricting abortion without insisting that the fetus has a low moral status.

When one tries to work out actual equal protection doctrine in this area, this possibility may turn out to be more theoretical than real. Any doctrine may require some balancing of interests or assessment of the weight of the state's interest in preventing abortion. But at least at the theoretical level, equal protection analysis of the abortion issue, unlike the substantive due process approach, permits an argument for abortion that does not disparage the moral status of the fetus. Many opponents of laws restricting abortion are careful to emphasize that they are concerned with the status of women, and that they do not want to disparage the moral status of the fetus.[147] These arguments reflect an aspect of the debate about abortion that is captured by the sex discrimination approach to *Roe* but not by the substantive due process approach.

2. Applying the discriminatory intent standard to abortion.

When *Roe v Wade* is analyzed as a sex discrimination case, the

---

[146] For example, homicide is permitted if committed in self defense, or in certain conditions of necessity. If abortion should be viewed as no worse than homicide in those circumstances, then to permit such homicides but prohibit abortion constitutes sex discrimination. On the relationship between abortion and self defense, see Robin West, *Jurisprudence and Gender*, 55 U Chi L Rev 1, 59-60, 66 (1988).

[147] See, for example, MacKinnon, *Feminism Unmodified* at 250-51 (cited in note 141).

current approach to discrimination—the discriminatory intent standard—fails for essentially the same reasons that it failed in the state action cases. In this respect *Roe* is typical of an important category of cases, just as *Shelley* was typical of the "state action" cases.

The discriminatory intent standard, as I said, is best understood as requiring a court hypothetically to reverse the groups affected by the challenged government action. In a case concerning the constitutionality of a restriction on abortion, therefore, the discriminatory intent test would require a court to ask whether abortion would be restricted in the same way if men, and not women, became pregnant.

Like the question that the discriminatory intent standard dictated in the state action cases, this question is wholly speculative at best, and probably meaningless. It is speculative because there is simply no way for a court reliably to answer the question how a state would treat abortion if men, instead of women, became pregnant. One can have intuitions, hunches, and suspicions about the answer to that question; but the fact is that neither a court nor anyone else knows the answer with any degree of certainty. As in the state action cases, no branch of natural or social science would even purport to be able to answer that question.

In addition to being speculative, the question is also probably meaningless, for the same reason that the parallel question in the state action cases was meaningless. The conceptual problem is more obvious in the abortion case than in the state action case. The potential capacity to become pregnant has to be regarded as one of the principal defining characteristics of being a woman.[148] Indeed, it seems even less possible to define a situation "comparable to pregnancy" than it did to define an adverse condition that affects whites in the same way that private racial prejudice affects blacks. If we hypothetically transfer that characteristic from

---

[148] See *General Electric Co. v Gilbert*, 429 US 125, 162 (1976) (Stevens dissenting) ("[I]t is the capacity to become pregnant which primarily differentiates the female from the male.").

I do not want to suggest that such a definition of women is desirable (any more than it is desirable to identify ethnic groups by their social status) or "natural," whatever that might mean. The fact that the capacity to become pregnant is one of the defining characteristics of women may be part of the problem: perhaps discrimination arises precisely because women are seen (by men and by women) as people whose principal role is to bear children. The only point is that if one were explaining the difference between human men and women to the proverbial visitor from Mars, one of the traits one would mention is women's capacity to bear children. That is enough to render the "reversing the groups" question incoherent in the abortion case.

women to men—if we hypothesize a world in which human "men" bear children, and human "women" have never had the capacity to bear children—we are no longer speaking of "women" and "men" in a way in which we have ever used those terms. To some extent, asking how men would be treated if they were able to become pregnant, and women were not, is equivalent to asking how men would be treated if they were women and women were men. That is not a meaningful question. One does not know where to begin in answering that question. But it is the question that the discriminatory intent standard requires a court to ask in any case that involves a restriction on abortion.

It is tempting to approach the problem by asking not what would happen if men became pregnant but what would happen if men were subject to a condition comparable to pregnancy. Some of the most famous treatments of the subject have attempted a similar approach.[149] But it seems impossible to define "a situation comparable to pregnancy" other than pregnancy itself. One would have to define a situation that has all of the moral, social, physical, emotional, and psychological aspects of pregnancy and childbirth. Every component of that definition would be problematic; in fact, it is far from clear what the components of the definition are. What physical conditions are comparable to pregnancy? What other event has a significance comparable to that of childbirth? What relationship can be analogized (morally, psychologically, or emotionally) to the relationship between a woman and the fetus she is carrying? Most pregnancies implicate the woman's relationship (broadly defined) to some man; what aspect of men's lives has the same character for them that that relationship, with its possible overtones of power and dependency, has for women? And, of course, what other being has a moral status comparable to that of a fetus? We do not have anything approaching agreed-upon answers to these questions.

What follows from this analysis? Perhaps the most immediately interesting conclusion is that one common position—that the result in *Roe v Wade* is clearly wrong—cannot be maintained. Even if all substantive due process rights were abolished, the Equal Protection Clause forbids state actions taken with an intent to discriminate on the basis of sex. When one applies that black-letter standard to *Roe v Wade*, one simply does not come up with a clear answer. One comes up with an unanswerable and probably

---

[149] Judith Jarvis Thomson, *A Defense of Abortion*, 1 Phil & Pub Affairs 47, 55-59 (1971). See also Donald H. Regan, *Rewriting* Roe v. Wade, 77 Mich L Rev 1569 (1979).

meaningless question about whether abortions would be allowed in a world in which men were women and vice versa. That incoherent question—not the conclusion that *Roe* is clearly wrong—is what established equal protection doctrine yields.

That is not to say that *Roe* is clearly right. In at least some of the state action cases, one could say, with a degree of confidence, that the states would not have tolerated a condition that was as burdensome to whites as private discrimination is to blacks. It is not clear, to me at least, that one can make the analogous statement about *Roe*; to the extent one can make sense of the question, it is not obvious to me that abortion would be generally permitted if men, not women, bore all the burdens of unwanted pregnancy. But the opposite is not obvious either. Under existing doctrine it is not correct to say either that *Roe* is plainly wrong or that it is plainly right. All one can say is that it is a difficult case, and that current equal protection doctrine—which, like all doctrine, is supposed to provide some clarity, or at least some guidance, in difficult cases—does not help very much.

3. Discriminatory intent and pregnancy discrimination.

Similar problems arise whenever a measure refers to a condition that cannot hypothetically be attributed to men without breaking down the existing categories of "men" and "women." The clearest example is other measures that classify on the basis of pregnancy. Indeed, the abortion question, if analyzed as a sex discrimination issue, can be seen as a special case of the general problem of measures that classify on the basis of the capacity to become pregnant.

a. In *Geduldig v Aiello*,[150] the Supreme Court held that the Equal Protection Clause permitted California to operate an employment disability insurance plan that covered almost all disabilities except for those resulting from normal pregnancy.[151] Under the

---

[150] 417 US 484 (1974).

[151] In *Gilbert*, 429 US 125, the Court held that the anti-discrimination provisions of Title VII of the Civil Rights Act of 1964, 42 USC §§ 2000e-2(a) and (b)—including the "disparate treatment" standard, which the Court viewed as imposing requirements similar to those of the Equal Protection Clause (*Gilbert*, 429 US at 133-37)—did not prohibit a private employer from operating a similar plan. Congress subsequently overruled *Gilbert* and amended Title VII to establish that discrimination on the basis of pregnancy is to be treated in the same way as sex discrimination. Pregnancy Discrimination Act of 1978, 42 USC § 2000(e)(k) ("The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions."). But the constitutional issue remains, as does the conceptual problem.

discriminatory intent standard, the question is whether the insurers would cover disabilities comparable to those caused by pregnancy if those disabilities befell men. It is certainly possible that the decision to exclude pregnancy reflects insensitivity to women's concerns, and that if the employer took women's inability to work as seriously as men's, it would cover disabilities related to pregnancy. But it is also possible that there are neutral reasons for excluding pregnancy-related disabilities from an insurance plan, where "neutral" means reasons that would cause the decision maker to deny comparable benefits to men. The problem is somewhat similar to that raised by the abortion case: at some level, the courts are trying to decide how men would be treated if they became pregnant.

Just as some of the state action issues are more manageable than *Shelley*, however, so the disability insurance question may be more manageable than the abortion problem; there may be a way of muddling through. If there are neutral reasons for treating pregnancy differently from other disabilities, the insurer should be able to supply them. The court can then consider whether the insurer really has acted on those reasons across the board, with respect to disabilities that affect men. The reason that this approach may work in this context is that the disability insurance question is concerned only with certain limited aspects of pregnancy—those aspects that make people unable to work—rather than the far more complex aspects of pregnancy implicated in the abortion decision. It is impossible to identify any condition that resembles pregnancy in the ways that are relevant for the abortion issue. But it may be possible to identify disabilities that are similar to those caused by pregnancy in the ways that are relevant to the insurer's decision to exclude pregnancy from the insurance plan—such as duration or the seriousness of the condition. Unless those similar disabilities are also excluded from coverage, there is strong reason to believe that the exclusion of pregnancy is discriminatory.

Even if the discriminatory intent standard could be applied in this way, it ignores a dimension of the problem that a subordination or second-class citizenship approach might capture. Suppose an employer could show that it would exclude from coverage any disability that had the characteristics of pregnancy. Still, the fact that the insurance plan excludes a category of coverage that is so important to women should matter. Even if the decision to exclude such coverage is made impartially, that decision makes it more difficult for women, as a class, to work; and that suggests that impartiality is not enough.

The Supreme Court's reasoning in the cases illustrates the difficulties that the discriminatory intent standard has in analyzing this issue and shows the affinity between it and the state action question. In *Geduldig*, for example, the Court reasoned that the exclusion of pregnancy from the insurance plan was not discriminatory because men and women received the same "aggregate risk protection" in the sense that "[t]here is no risk from which men are protected and women are not."[152] Indeed, in a later case arising under Title VII, the Court specifically relied on the absence of "proof that the [total insurance] package is in fact worth more to men than to women."[153]

The Court's arguments resemble the attack on *Shelley*: since neither blacks nor whites are protected against racially restrictive covenants, how can there be discrimination? Since neither men nor women receive greater aggregate benefits, how can there be discrimination? The problem with this argument is that its premise—nondiscrimination consists of providing men and women with insurance packages of equal value—is inconsistent with the discriminatory intent standard. That premise is comparable to saying that an umpire is impartial so long as he or she makes the same number of rulings in favor of each team. Some teams may be entitled to a greater number of favorable rulings because they play better; some groups may be entitled to greater protection against racially restrictive covenants because they are more severely injured by them; some groups may be entitled to more disability benefits because they suffer more disabilities.

There could be, of course, a conception of discrimination under which an employer does not discriminate so long as it provides insurance packages of the same value to men and women, or, for example, so long as it hires the same number of black and white employees, even if there are more black employees who are qualified. But one would have to justify such a conception. The Court does not purport to be using such a conception; it purports

---

[152] *Geduldig*, 417 US at 497-98. See also *Gilbert*, 429 US at 135, quoting this passage from *Geduldig*. For a more elaborate version of the same argument, see George Rutherglen, *Sexual Equality in Fringe Benefit Plans*, 65 Va L Rev 199, 232-41 (1979).

[153] *Gilbert*, 429 US at 138. The Court also reasoned that the exclusion did not constitute discrimination because there was no "identity between the excluded disability and gender as such" (*Gilbert*, 429 US at 135, quoting *Geduldig*, 417 US at 497 n 20). If the Court meant by this that the class of people who suffer from disabilities related to pregnancy is not the same as the class of all women, the observation is immaterial. A law that explicitly treats a subset of blacks or women differently from all other persons ("all blacks taller than six feet" or "all women over 30") is still an explicit classification.

to be applying the discriminatory intent standard. And under the discriminatory intent standard, interpreted in the only plausible fashion, it is not necessarily true that there is no discrimination so long as the insurance packages are of equal value.

Under the discriminatory intent standard, one can determine whether an actor has discriminated only by reversing the groups and asking whether the actor would have behaved the same way in those counterfactual circumstances. In the case of abortion, that approach led to an incoherent question. In the case of insurance coverage for disabilities related to pregnancy, it may lead to a manageable question, but that question cannot be answered just by showing that men and women received insurance packages of equal value. Still, even in the relatively manageable context of disability insurance, the problems of speculativeness persist; the question that the discriminatory intent standard poses continues to have the flavor of the question about child-bearing men.

E. The Significance of the Failures

Washington v Davis established the discriminatory intent standard as the comprehensive account of discrimination under the Equal Protection Clause. But, in the case of abortion, the discriminatory intent standard requires courts to answer a question that is literally meaningless. In the so-called state action cases, it poses a question that will often be meaningless and that, even in cases in which the courts can muddle through, will call for a high degree of speculation. In the case of disability insurance the question may be more manageable, but the problems of speculativeness remain substantial. In each of these areas, the discriminatory intent standard is seriously inadequate.

There is, of course, a limit to how much doctrine can do to make hard cases easier. It may even be a sign of an ill-conceived doctrine that it makes an easy case out of a case in which the underlying issues are truly difficult. But the problem with the discriminatory intent standard is not that it makes these cases hard but that it makes many of them hopeless. In the next section I will argue that the inadequacy of the discriminatory intent standard extends far beyond these unusually controversial areas. But for now it is important to note that these are important failures in their own right. They cannot be dismissed as glitches or quirks. Issues like those presented in *Shelley* and *Roe* go to the core of the problem of discrimination.

In the area of sex discrimination, the discriminatory intent standard purports to give a complete account of what kinds of

measures affecting women are acceptable. No such account can claim to be adequate if it simply ignores, or refuses to address, the fact that women become pregnant and men do not. Any conception of sex discrimination that purports to be comprehensive must have something to say about the question: what is the nondiscriminatory response to the fact that women and not men become pregnant? The answer might be that that fact justifies certain distinctions between men and women but not others; the answer might even be that it justifies no distinctions at all. But a principle or doctrine is not a comprehensive account of sex discrimination if, like the discriminatory intent standard, it says nothing coherent or helpful about how to act in the face of that fact.

It is less obvious, although, I think, equally true, that no theory that purports to deal comprehensively with the problems of racial discrimination and the status of minorities can ignore the question: what constitutes a nondiscriminatory response by the government to the injuries inflicted by private prejudice? It is settled law that the Equal Protection Clause does not directly forbid private discrimination, and I do not challenge that view. But it is implausible to interpret the Equal Protection Clause to say that governments may respond to private bias in any way they wish, even if the response is discriminatory. Suppose, for example, that a state enacted a statute providing increased punishment for assaults motivated by racial, ethnic, or religious antagonism, but excluded from the statute assaults against, say, Asian-Americans. There is no question that that measure would violate the Equal Protection Clause: the state has responded to private discrimination in a way that is not impartial.

The issue in *Shelley* and the state action cases is whether the state has done the same thing, only covertly. If a state cannot enact a facially non-neutral response to private discrimination, it also should not be able to engage in covert discrimination under the guise of a facially neutral regime. The Equal Protection Clause was designed to deal with a world characterized by both private and public discrimination, and government responses to private violence were, as I have noted, a principal concern of the drafters. An equal protection doctrine that has literally nothing coherent to say about government responses to private discrimination, except to impose the easily evaded rule that the state must not discriminate in an obvious way, is, to that extent, a fundamentally inadequate doctrine.

For these reasons, even if the failures of the discriminatory intent standard were confined to the areas of state action and

pregnancy discrimination, there would be powerful reasons for concluding that the standard is not an adequate comprehensive account of discrimination. But the failures are not so confined, as I will now attempt to show.

V. The Magnitude of the Failure

The failures of the discriminatory intent standard I described in the last section are the rule, not the exception. In this section I will argue for this proposition first by considering several issues that either have arisen in the cases or are current subjects of discussion—veterans' preferences, laws concerning rape, sexual and racial harassment, and welfare laws. Problems of the sort that I identified in connection with *Shelley* and *Roe* occur in each of these areas.

Then I will return to employment discrimination, the one area where, I suggested earlier, the discriminatory intent standard seems to work well. I will argue that even there the problems I have described in connection with *Shelley* and *Roe* arise in all but a limited category of cases. In the area of employment discrimination (as in some of the state action and pregnancy discrimination cases) there is a clear doctrinal implication of my analysis: the "disparate impact" standard of *Griggs v Duke Power Co.*,[154] which is commonly regarded as different from the discriminatory intent standard, is in fact the only effective way to implement the discriminatory intent standard.

A. Veterans' Preferences

In *Personnel Administrator v Feeney*,[155] the Supreme Court upheld a Massachusetts statute that required all qualified veterans to be ranked above all nonveterans on eligibility lists for state civil service jobs. Because the class of veterans was disproportionately male, "[t]he preference operate[d] overwhelmingly to the advantage of males."[156] In the course of rejecting an Equal Protection Clause challenge to the statute, the Supreme Court noted that veterans' preferences have "traditionally been justified as . . . measure[s] designed to reward veterans for the sacrifice of military service, to ease the transition from military to civilian life, to encourage patriotic service, and to attract loyal and well-disci-

---

[154] 401 US 424 (1971).
[155] 442 US 256 (1979).
[156] Id at 259.

plined people to civil service occupations."[157]

Under the holding in *Washington v Davis* that the discriminatory intent standard is a comprehensive account of discrimination under the Equal Protection Clause, the discriminatory intent standard governs this issue, as the Supreme Court recognized. Under the "reversing the groups" test, which is the only plausible definition of discriminatory intent,[158] *Feeney* would pose the following question. Suppose a group consisting almost entirely of women (but not including all women) was subjected to something comparable to military service in that it was important to society, hazardous, disruptive of one's career, conducive to developing certain virtues, and so on. (Offhand, bearing children seems to be a good candidate.) Suppose there was a measure that would reward the women who have undertaken this task. Suppose the measure could be justified as a means of serving objectives comparable to those promoted by the veterans' preference—encouraging others to undertake the same task, taking advantage of the desirable character traits, and so on. But suppose further that this measure has a "devastating"[159] effect on the employment prospects of a group consisting of nearly all the men in the state and many women as well, while greatly enhancing the position of the group consisting almost entirely of women. Under the "reversing the groups" test, the question in *Feeney* is whether the state would have enacted such a measure.

Although that question obviously requires a degree of speculation, one might be able to make plausible arguments one way or the other by investigating other state policies that have different effects on the employment prospects of men and women. A state that provided a preference to veterans but failed to enact a measure that aided women who returned to the labor force after having children, for example, would at least have to explain its action.

But suppose the state justifies a veterans' preference simply by asserting that military service is uniquely important to society and uniquely worthy of a reward. Military service, the state might say, is sui generis; nothing else—maternity, work in a hazardous civilian enterprise—can be regarded as comparable. Then how does a court assess the veterans' preference under the "reversing the groups" test?

This is the point at which *Feeney* begins to resemble *Roe* and

---

[157] Id at 265.

[158] See note 80 on the definition of discriminatory intent offered in *Feeney*.

[159] *Feeney*, 442 US at 260 (describing district court findings).

Shelley. Under the "reversing the groups" test, one would have to ask whether the government would have the same view of military service if it were "women's work" instead of "a man's job"—not only in the sense that a disproportionate number of servicemembers were women, but in the sense that military service in all its forms was historically regarded as a women's occupation.[160] That question presents the problem that arose in *Shelley* and *Roe*. It recurs here because the distinctive traits that make veterans seem so deserving are associated with being male in somewhat the same way (although not to the same degree) that the capacity to be pregnant is associated with being a woman and the status of a group historically subject to discrimination is associated with being black. Membership in the warrior class has historically been linked with maleness. Willingness to undergo "the sacrifice of military service" is generally thought of as a male virtue, especially where the more dramatic forms of sacrifice, such as physical ordeals and danger, are concerned.

For these reasons, asking how the state would regard a class of veterans consisting entirely of women is not altogether different from asking how the state would treat pregnant men. The question may not make any sense because the characteristic cannot be disassociated from the group, in the way required by the impartiality model, without breaking down the usual notions of men and women.

The Court's analysis in *Feeney* does not recognize these points; it shows the kind of superficiality and reluctance to apply the discriminatory intent standard seriously that characterizes the critics of *Shelley* and the Court in *Geduldig*. The Court rejected the Equal Protection Clause claim in *Feeney* for essentially two reasons. First, the Court stated that the Massachusetts statute had been adopted in order to benefit veterans, not to hurt women.[161] As I noted in section II, this argument seems premised on the mistaken notion that the discriminatory intent standard requires a showing of malice.[162] But the Court also addressed the argument that the veterans' preference was analogous to *Gomillion*. As I have explained, the discriminatory intent standard is best understood as a generalization of the principle of *Gomillion*, so it is this part of the Court's reasoning that addresses the claim that the dis-

---

[160] See Seidman, 96 Yale L J at 1038-39 (cited in note 71), for a somewhat similar argument about *Feeney*.

[161] See *Feeney*, 442 US at 279-80.

[162] See note 80 and text at notes 80-82.

criminatory intent standard, rigorously applied as I have described it, would invalidate the veterans' preference.

The Court answered this argument by noting that "significant numbers of nonveterans are men, and all nonveterans—male as well as female—are placed at a disadvantage. Too many men are affected by [the statute] to permit the inference that the statute is but a pretext for preferring men over women."[163] This is a non sequitur, parallel to the superficial notion of impartiality advanced by the critics of *Shelley* and the defenders of *Geduldig*. That many men were disadvantaged does not at all preclude the possibility that the veterans' preference is the product of legislative intentions that are no different, in relevant respects, from those that produced *Gomillion*. Suppose a legislator was determined—consciously or unconsciously—to reserve the better civil service jobs for men but wanted to do so in a way that would not be immediately invalidated by the courts. What better way to accomplish this objective than to adopt a veterans' preference? That will succeed in reserving the civil service jobs for males, and excluding women from them. Since there are more men than there are civil service jobs, some men must lose out as well. But the fact that employees are chosen on the basis of veterans' status (instead of conventional qualifications, or a lottery) is no evidence at all that the government was not discriminating against women.

B. Aspects of the Laws Concerning Rape

Aspects of the laws concerning rape—especially the contours of the defense of consent and the extent to which the victim should be shielded from cross-examination—have been criticized on the ground that they discriminate against women.[164] Under the "reversing the groups" test, the question should be: if men instead of women were the principal victims of rape, and women were the

---

[163] *Feeney*, 442 US at 275. In his concurring opinion, Justice Stevens offered similar reasoning:

> [T]he number of males disadvantaged by Massachusetts' veterans' preference (1,867,000) is sufficiently large—and sufficiently close to the number of disadvantaged females (2,954,000)—to refute the claim that the rule was intended to benefit males as a class over females as a class.

Id at 281.

[164] See, for example, Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 Colum L Rev 1 (1977) (dealing principally with victims' treatment in the judicial process); Susan Estrich, *Real Rape* (Harvard, 1987) (dealing principally with issues relating to consent). See also Diana E. H. Russell, *Sexual Exploitation* (Sage, 1984); Diana E. H. Russell, *The Politics of Rape* (Stein and Day, 1975); Susan Brownmiller, *Against Our Will: Men, Women, and Rape* (Simon & Schuster, 1975).

principal perpetrators, would these aspects of the laws concerning rape be the same? The argument against a broad definition of consent, or against permitting vigorous cross-examination of rape victims, is that measures inflicting similar injuries on men would not be tolerated.

As in some of the state action cases, some of the pregnancy discrimination cases, and the veterans' preference case, it may be possible to make headway under the impartiality model by examining the treatment of men who are subjected to physical assaults and sexual abuse. But again the question requires a great deal of speculation and threatens to become incoherent. A world in which men were the principal victims of rape, and women the principal perpetrators, would—like a world with pregnant men and no pregnant women, or with an exclusively female warrior class—be one in which the categories of male and female have a very different meaning from that which they have for us today. Under the governing conception of discrimination, courts must imagine that world in order to consider whether aspects of the rape laws discriminate against women.

The results are comparable to those in the other areas I have discussed. One cannot say with any confidence that various aspects of the rape laws do not constitute impermissible discrimination; one can certainly make a strong argument against many aspects of the rape laws on these grounds. But usually the arguments will not be conclusive. The discriminatory intent standard leaves courts with a vague, possibly incoherent inquiry that by no means rebuts the claims of those seeking to overturn established practices. In these circumstances it is difficult to see why the alternative conceptions of discrimination are not at least as good.

C. Sexual and Racial Harassment

Similar issues arise in connection with sexual harassment and other practices (such as racial abuse and epithets) that create a hostile working environment. Consider the following example. Employees at the same level as the plaintiff—that is, not supervisors—have engaged in sexual harassment or have otherwise created a hostile work environment. The employer acknowledges that it was fully aware of the harassment and did nothing to stop it. But the employer asserts, truthfully, that it has an across-the-board policy of ignoring all harassment, regardless of the race or the sex of the source or the victim. Therefore, the employer claims, it has

not engaged in discrimination.[165]

This argument has never been accepted by the courts.[166] But under the discriminatory intent standard, it is not obvious why it is wrong. It is, in fact, much like the (initially plausible) arguments offered by the critics of *Shelley* and the defenders of *Geduldig*. Superficially, it is difficult to see why the employer discriminates in this case any more than the government does when it provides no protection to anyone against private discrimination, or when it affords insurance plans equal in dollar value to both men and women.

More carefully applied, however, the discriminatory intent standard raises the question whether the employer would adopt a similar attitude toward sexual harassment if men, not women, were almost exclusively the victims. That question again seems highly speculative at best; in addition, like the other questions I have considered, it breaks down the categories of male and female in a way that renders the question almost meaningless. A world in which women frequently harass men and men hardly ever harass women is not a recognizable world about which one can meaningfully ask hypothetical questions. There is an obvious parallel to the question raised by the claim that the rape laws are enforced in a way that

---

[165] See *Bohen v City of East Chicago, Ind.*, 622 F Supp 1234, 1247 (N D Ind 1985), rev'd, 799 F2d 1180 (7th Cir 1986):

> The employees . . . all have their private agendas, some of which include making sexual advances on other employees or otherwise being obnoxious. The fundamental decision of the [employer] was to do nothing—to offer no protection to its female [employees] against the depredations of male employees. . . . [This] decision to be passive offered everyone "equal protection" from such depredations—that is, the [employer] offered no one protection of any kind. Males could accost females, males could accost males, females could accost males, females could accost females . . . . The [employer] did not offer women a lower degree of protection; no protection is all it offered anyone.

[166] See, for example, *Bohen v City of East Chicago*, 799 F2d 1180 (7th Cir 1986); *Erebia v Chrysler Plastic Products Corp.*, 772 F2d 1250, 1253-59 (6th Cir 1985); *Walker v Ford Motor Co.*, 684 F2d 1355, 1358-59 (11th Cir 1982). The specific point is well discussed in *Bohen*, 799 F2d at 1189-92 (Posner concurring).

The Supreme Court has not squarely addressed the issue. *Meritor Savings Bank v Vinson*, 477 US 57 (1986), held that an employee shows a violation of Title VII if he or she establishes "that discrimination based on sex has created a hostile or abusive work environment." 477 US at 66. But *Meritor* involved sexual harassment by a supervisor of a subordinate. This is arguably a different question from harassment by a co-worker of the same level. See *Hunter v Allis-Chalmers Corp.*, 797 F2d 1417, 1421-22 (7th Cir 1986). The Court did suggest in *Meritor*, however, that an employer's liability for harassment by supervisors depends in part on whether it knew of the harassment and had taken measures to prevent or stop it. If the employer's knowledge is the crucial element, then an employer would probably be liable if it knew of, and did nothing about, harassment by employees at the same level.

discriminates against women.[167]

Nonetheless, as I noted, in this context the courts have had little difficulty rejecting the argument that an employer or a government does not discriminate when it adopts a superficially even-handed policy of refusing to act against a private practice that primarily victimizes one group. The fact that the courts have not had difficulty rejecting this argument is an indication that they already recognize the inadequacy of the discriminatory intent standard.

D. Reductions in Welfare Benefits

All of these examples—government responses to private discrimination, abortion, pregnancy discrimination, veterans' preferences, and rape—involve issues that are arguably peripheral to everyday government. Legislatures do not spend a lot of their time on these issues. But the same kinds of problems that were found in *Shelley* and *Roe* can also arise in connection with the central concerns of the welfare state. Consider the following example, modeled on *Jefferson v Hackney*.[168] Suppose the government reduces taxes and also reduces benefits for recipients of Aid to Families with Dependent Children ("AFDC"). It does not reduce benefits under other welfare programs, in particular those for people with disabilities. AFDC recipients are disproportionately black (approximately half of all AFDC recipients are black, although the popular image is very likely that a higher percentage is black).[169] Assume that the percentage of blacks among the beneficiaries of the disability programs is much smaller.

There may, of course, be sound reasons for differentiating between AFDC recipients and beneficiaries of other government pro-

---

[167] See *Bohen*, 799 F2d at 1190, 1191 (Posner concurring), for the analogies to rape and pregnancy discrimination.

[168] 406 US 535 (1972). *Jefferson* itself presented unusual facts; for example, the district court had found that the officials responsible for the challenged decision actually did not know the races of those affected by the decision. Id at 547. If there were a situation in which a government decision maker really did not know (and had no basis for guessing) the races of any of those affected by any aspect of the decision, there could be no showing of discriminatory intent. In such a case the decision would necessarily be the same even if the races of the affected groups were reversed, since something the decision maker did not know could not possibly have affected the decision. But such situations will be very rare—perhaps nonexistent. Even where the decision is among individual applicants and the application process is deliberately race- or sex-blind, the criteria used in making the decision might be challenged as discriminatory.

[169] See, for example, Henrietta J. Duvall, Karen W. Goudreau, and Robert E. Marsh, *Aid to Families With Dependent Children: Characteristics of Recipients in 1979*, 45 Soc Sec Bull 5 (April, 1982).

grams. The government may conclude that AFDC recipients are more "able . . . to bear the hardships of an inadequate standard of living."[170] Or the government might decide that it is better policy to encourage adult AFDC recipients to seek jobs; or it might simply conclude that AFDC payments, considering all relevant factors—need, desert, economic incentives—were too high compared to disability benefits.

On the other hand, it is certainly possible that a decision to reduce AFDC benefits reflects racial discrimination—not animus, perhaps, but "racially selective indifference."[171] That is, legislators who are free of conscious discrimination may nevertheless be better able to sympathize with the suffering of members of their own race than with the plight of a group composed disproportionately of members of a different race. They may also be more quick to indulge in unfavorable stereotypes about members of another race.

What should a court do if this legislation is challenged as a violation of the Equal Protection Clause? Under current doctrine, the court would have to apply the discriminatory intent standard; as I have argued, the only plausible interpretation of that standard is the "reversing the groups" test. Under the "reversing the groups" test, the question would be whether the government would have reduced AFDC benefits, relative to other programs, if AFDC recipients were disproportionately white.

This question is not of the same order as a question about pregnant men, or even about a world in which blacks are dominant and whites are the principal victims of discrimination. But it is, again, difficult to see how a court can answer the question without great speculation at best. Even introspectively, it is difficult to know whether one would view AFDC recipients as equally deserving, sympathetic, and highly motivated if the predominant image of an AFDC recipient were white instead of black. We are so accustomed to certain racial groups occupying certain social positions that it is almost impossible to imagine what one's attitudes would be in a world in which whites instead of blacks were disproportionately represented among the disadvantaged. Not only does the question require speculation, but again, like the *Shelley* and *Roe* questions, it requires us, to some extent, to break down the racial categories with which we are familiar.

These difficulties are substantial even when one considers the question introspectively. They become practically insuperable

---

[170] *Jefferson*, 406 US at 549.

[171] Brest, 90 Harv L Rev at 7-8 (cited in note 4).

when a court must decide how another group of people, such as the legislature, would have reacted under the hypothetical circumstances.

Governments frequently decide among social programs that are closely identified with the interests of one racial or ethnic group, or with the interests of women. The progressivity of the tax structure, local laws concerning education, measures relating to the criminal justice system, laws concerning divorce, child custody, and child care—arguments like the one I have just made apply in all of these areas. Government action in these areas, including reductions in funding or failures to provide funding,[172] can be challenged under the "reversing the groups" test. Would more be spent on public schools in major cities if the student populations were disproportionately white instead of disproportionately black? Would more be spent on child care if men instead of women were primarily responsible for looking after children? Would the criminal justice system be structured differently if a disproportionate number of whites, instead of a disproportionate number of blacks, were caught up in it?

These questions cannot be answered quickly. Claims that government programs of these kinds fail the "reversing the groups" test may not be obviously right, but it is difficult to see how they can be dismissed out of hand as obviously wrong. This is an irony; as I discussed, one aspect of the taming of *Brown*, in *Washington v Davis*, was the Court's conclusion that the discriminatory intent standard was superior because it would *not* "raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes."[173] Rigorously applied, however, the discriminatory intent standard has exactly the effect the Court thought it would not have: it does raise serious questions about a wide range of such programs. It is more than possible that many of these programs would be different in a world in which the positions of the races and sexes were reversed.

But while the discriminatory intent standard raises these questions, it usually does not provide clear answers, because reversing the groups presents some of the *Shelley* and *Roe* problems. It is difficult to imagine a world in which social positions and characteristics are dissociated from groups in this way. And if we could imagine that world, asking how tax or child care laws would look in

---

[172] See note 120 and accompanying text (on repeal of or failure to pass civil rights laws).

[173] *Washington v Davis*, 426 US at 248.

such a world is obviously an extraordinarily speculative question. As in the other cases, it may be possible to muddle through by analyzing comparable programs. Or one could make the burden of proof decisive, but again that approach would have the very substantial cost of either requiring an extraordinary expenditure of resources by the government or immunizing subtle government discrimination in areas where discrimination may well be a serious problem. The ultimate conclusion is that across a wide range of issues, the discriminatory intent standard is fundamentally unsatisfactory and the alternatives are more promising.

E. Employment Discrimination Revisited

Is there any area in which the discriminatory intent standard works well? In section II, I suggested that the discriminatory intent standard could analyze, reasonably well, a garden-variety employment discrimination claim, such as a claim that an employer refuses to promote women employees even though it promotes men who have the same qualifications. But the analysis I applied to cases like *Shelley* and *Roe* suggests that even in that area, where the discriminatory intent standard is at its best, it is successful only in a limited category of cases.

I suggested that the discriminatory intent standard can work in employment discrimination cases because there will often be, in practice, ways of establishing whether the employer has discriminated. In particular, a court can attempt to determine whether rejected minority or women applicants were as qualified as their successful competitors. Alternatively, it might examine the employer's past decisions for a telltale statistical pattern. But these means of proof presuppose that the court can identify reasonably determinate criteria or qualifications that the employer used in making employment decisions. If a court can identify such criteria, it can then try to determine whether a minority or woman employee received less favorable treatment than an equally qualified white or male employee would have received, either by a direct comparison or by examining statistical patterns. To the extent the criteria the employer uses are either in dispute or indeterminate, these methods of proof will not work. If one does not have determinate qualifications, one cannot decide which of two employees or applicants is better qualified, and for statistical purposes one cannot hold constant the legitimate criteria that the employer used.

It therefore appears that the discriminatory intent standard works well only when the challenged decision is acknowledged, on all sides, to have been made in accordance with relatively determi-

nate criteria.[174] This may accurately describe a significant number of employment cases. It may also describe certain other cases, such as zoning and districting cases: the criteria a zoning board uses in deciding whether to grant a variance, and the criteria used in drawing district lines, may be relatively determinate.

But the other questions I have considered—and most government decisions—are not made by applying determinate criteria. There are no given, determinate criteria for deciding the amount of resources to devote to combatting private prejudice; or how wealth should be allocated among taxpayers and various categories of benefit recipients; or how much others should contribute to provide insurance against disabilities related to pregnancy; or how to balance the fetus's interests against the pregnant woman's. Whenever the challenged decision does not involve the application of relatively determinate criteria—which is to say, across an exceptionally wide range of government decisions—problems of the sort I described will arise.

This includes many employment decisions. In the employment area, the *Shelley* and *Roe* problem arises most acutely if the claimant concedes that the employer has applied certain criteria in a nondiscriminatory fashion but asserts that the decision to adopt those criteria was discriminatory. Commonly, for example, an employer applies uniform, facially neutral criteria that have the effect of disqualifying a disproportionate number of minority or women applicants for a position. That by itself does not establish discriminatory intent. But suppose a plaintiff in a Title VII suit, while acknowledging that the employer consistently applied these facially neutral criteria and that he or she was not sufficiently well-qualified under the criteria, asserts that the employer would have used different criteria if the bulk of the applicants disqualified by the criteria were white or male.

That assertion states a claim of discriminatory intent, of impermissible partiality. But evaluating that claim can lead to the same kinds of speculative or meaningless questions that arose in *Shelley* and *Roe*.

Suppose, for example, that women characteristically deal with moral issues not by abstract assertions of rights but by emphasizing relationships and context. (This is, of course, an oversimplified version of what some feminist theorists have suggested.[175]) Sup-

---

[174] See also Ely, 79 Yale L J at 1228-49 (cited in note 4).

[175] The position is most commonly associated with Carol Gilligan, *In a Different Voice* (Harvard, 1982). See also Nancy Chodorow, *The Reproduction of Mothering* (U Cal, 1978);

pose further than an employer rejects a woman applicant for a position on the ground that she displays these traits and is therefore insufficiently "aggressive." It is stipulated that the employer would have hired (and has hired) "aggressive" women, and that the employer would not hire men who were as unaggressive as the claimant. But the claimant asserts that the choice of this kind of aggressiveness as a qualification is itself not impartial.

In particular, the claimant might suggest that the employer is (perhaps unconsciously) prejudiced against women and therefore undervalues what it views as women's characteristics. Or the claimant might argue that the employer is more sympathetic to men seeking positions than to women and therefore would never use a criterion that has as devastating an effect on men's prospects as the use of the aggressiveness criterion has on women's prospects.

In either event, this is a straightforward claim of discriminatory intent. The argument is that the employer has not been impartial in its choice of criteria. If the claimant can establish that, she is entitled to prevail under the discriminatory intent standard. An employer who deliberately chose a criterion in order to disqualify a disproportionate number of women would plainly violate the discriminatory intent standard; there is no reason to treat unconscious discrimination differently.

Evaluating this claim, however, raises the problems of *Shelley* and *Roe*. One would have to imagine a world in which the characteristics described by the feminist theorists I mentioned earlier are reversed. In the hypothetical world that the discriminatory intent standard requires the court to conjure up, women characteristically engage in formal assertions of rights in the way that men are now said to, and men characteristically act in the more contextual, relationship-oriented way attributed to women. A court would then have to decide what the employer would do in such a counterfactual world. Once again, the question is at least highly speculative, and it threatens to break down the existing categories of men and

---

Dorothy Dinnerstein, *The Mermaid and the Minotaur* (Harper & Row, 1976). In the legal literature, see, for example, Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 Va L Rev 543 (1986); Kenneth L. Karst, *Woman's Constitution*, 1984 Duke L J 447.

Other studies have suggested that Gilligan's findings may not be correct, or that they should not be interpreted as demonstrating actual differences in the characteristic ways in which men and women reason about moral issues. See, for example, William J. Friedman, Amy B. Robinson, and Britt L. Friedman, *Sex Differences in Moral Judgments? A Test of Gilligan's Theory*, 11 Psych of Women Q 37 (1987); Maureen Rose Ford and Carol Rotter Lowery, *Gender Differences in Moral Reasoning: A Comparison of the Use of Justice and Care Orientations*, 50 J Personality & Social Psych 777, 783 (1986).

women and ask a meaningless question along the lines of how would we treat men if they were women and women were men. But if we take the discriminatory intent standard seriously, there seems to be no way to avoid this question, even in the relatively commonplace employment discrimination case I have described.

This argument can be generalized. Suppose an employer uses, as one of its criteria, a requirement that applicants have certain educational achievements. Because of past societal discrimination, blacks have lower educational achievements than whites. The employer applies its criterion in a race-neutral fashion, and the effect is that a disproportionate number of whites are hired. A black applicant claims that the adoption of the criterion was discriminatory, under the discriminatory intent standard. The black claimant argues that the employer values educational achievement because it is associated with whites in the employer's mind, and lack of educational achievement is associated with blacks; the claimant argues further that the employer is more sympathetic to the plight of whites, and therefore would not use this criterion if it had as severe an effect on whites' opportunities as it in fact has on blacks', especially if the whites' lack of achievement was the result of past discrimination.

The same problems arise. The question is how the employer would act in a world in which blacks were better educated than whites, and in which the whites' condition was the result of discrimination. Would the employer still apply the educational achievement criterion and hire a disproportionate number of blacks? The problems are not as severe as those of *Shelley* and *Roe*—the counterfactual world with educationally disadvantaged whites and educationally advantaged blacks seems more manageable than the world of pregnant men—but many of the same difficulties are present. The problem resembles the example drawn from *Jefferson v Hackney*; certain social positions have come to be so closely identified with certain groups that to ask how we would treat those groups if they were in a different position may well be to ask a meaningless question.

These failures of the discriminatory intent standard in the area of employment discrimination have a direct doctrinal implication: they strongly support the use of the disparate impact standard established by *Griggs v Duke Power Co.* Under *Griggs*, if a criterion used in an employment decision has a disproportionate impact on a protected group, the employer must justify the criterion by showing that it serves a business necessity. This rule applies even if the employer cannot be shown to have acted with dis-

criminatory intent.[176]

In my first example, one reasonable way of determining whether the employer would have chosen "aggressiveness" as a criterion if it were a characteristic principally of women and not men is to examine the effect that abandoning that criterion would have on its business. If the criterion is vital to the success of the business, it is more likely that the employer would have chosen it even in the hypothetical world; if the criterion could be abandoned without substantial costs, there is more reason to suspect impermissible partiality. Thus the disparate impact standard, far from being (as it is conventionally thought to be) opposed to the discriminatory intent standard, may provide the best way of ascertaining whether there is discriminatory intent.

Moreover, in cases of this kind—when the discriminatory intent standard is applied to a claim that the choice of a criterion was discriminatory—there will be an unusually high likelihood of errors; that is because the discriminatory intent standard requires such speculative inquiries. The errors can occur in both directions, of course; an employer will sometimes be held liable even if it did not in fact discriminate. But *Griggs* identifies those cases in which making a mistake will impose the least cost on the employer. In view of the danger of discrimination that arises whenever an employer uses a criterion with a disproportionate adverse effect on a protected group, it is reasonable to require the employer, if the use of the criterion is not very important to the business, to take the relatively inexpensive step of abandoning it.

---

[176] Very recently, in *Wards Cove v Atonio*, 109 S Ct 2115 (1989), the Supreme Court substantially modified the *Griggs* rule. The Court did not abandon the principle that a disproportionate impact, if not adequately justified, constitutes unlawful employment discrimination even if the plaintiff has not demonstrated "the employer's subjective intent to discriminate." Id at 2119. But the Court said that "the dispositive question is whether a practice [that creates a disparate impact] serves, in a significant way, the legitimate employment goals of the employer," and that while "a mere insubstantial justification . . . will not suffice . . . there is no requirement that the challenged practice be 'essential' or 'indispensable' to the employer's business." Id at 2125-26. The Court also held that the plaintiff has the burden of proving the absence of a business justification; the employer has only the burden of coming forward with evidence. Id at 2126. And the court required plaintiffs to identify the specific discriminatory practices that create a disparate impact. Id at 2124-25.

The opinion is puzzling in many respects: it resolves issues that the Court did not have to reach; it marks a sharp turn in the law with only a brief acknowledgment that the Court's previous decisions "can be read as suggesting otherwise," id at 2126; and it identifies the supposed weaknesses of the previous law in brief, essentially unsupported assertions.

Most important, however, the decision reflects no recognition of the practical and conceptual problems presented by a discriminatory intent approach, and the need for a more workable alternative. Nor does it recognize the extent to which *Griggs* may be the best means of implementing the discriminatory intent standard.

Griggs is generally said to impose an additional requirement that goes beyond the discriminatory intent principle thought to be the core of Title VII. Sometimes *Griggs* is even said to be in tension with the discriminatory intent standard. In fact the opposite is more nearly true: *Griggs* is a reasonable way, probably the best way, to implement the discriminatory intent standard in cases in which the employer's choice of criteria is challenged. A discriminatory intent standard that is not supplemented with a requirement like that of *Griggs* will be less faithful to its own purposes because it will often be unable to detect impermissible partiality in the choice of criteria.

* * *

The failures of the discriminatory intent standard are pervasive. They are best illustrated in notoriously problematic cases like *Shelley* and *Roe*. Indeed, the inadequacy of the standard is one reason those cases are so problematic. But the same difficulties that plague the standard in those contexts exist across a wide range of cases. The failure consists of this: in all but a relatively narrow category of cases—cases in which the challenged governmental decision involves simply the application of given and relatively determinate criteria—the discriminatory intent standard requires a court to ask a question that is highly speculative and possibly meaningless.

It is possible that that is the best we can do. But there are alternative conceptions of discrimination, conceptions the have roots in the Reconstruction Era cases and that were entertained as serious possibilities in the twenty years between *Brown* and *Washington v Davis*. In *Washington v Davis* the Court rejected those alternatives because they seemed vague and unmanageable. In the end, however, the discriminatory intent standard seems worse.

VI. Conclusion

The discriminatory intent standard is not adequate as a comprehensive account of discrimination. It works well in a limited category of cases; but outside that limited area it requires courts to answer questions that are speculative at best and often incoherent. Contrary to appearances, the discriminatory intent standard is not less vague or more determinate than alternative approaches like stigma and subordination.

That is not to say that the discriminatory intent standard is useless. It works well in cases that involve the application of deter-

minate, unchallenged criteria. In the state action area, applying the discriminatory intent standard produces some interesting results: it recasts the so-called state action problem; it provides a reasonable justification for cases that have been widely criticized; and it dictates that certain kinds of evidence that have previously been ignored must be considered. Similarly, applying the discriminatory intent standard to *Roe v Wade* establishes that that decision cannot be condemned as clearly wrong; and the discriminatory intent standard helps analyze the problem of pregnancy discrimination.

Applied rigorously, the discriminatory intent standard raises questions about a wide range of institutions, from veterans' preferences to rape laws to reductions in welfare payments—an ironic conclusion, in view of the Supreme Court's explicit desire in *Washington v Davis* to avoid such questions. The discriminatory intent standard provides a secure foundation for the disparate impact standard of *Griggs*. And it identifies a common element in a wide range of vexing cases—each of them is troublesome because we do not have sufficiently well-developed notions of discrimination.

Discriminatory intent is, therefore, a useful and important notion in many ways. *Washington v Davis* was a wrong turn not because it recognized the usefulness of the notion of discriminatory intent but because it mistakenly adopted the discriminatory intent standard as a comprehensive account of discrimination. Notions like subordination, stigma, and second-class citizenship must play a role in the law of the Equal Protection Clause. They are open-ended; but no more open-ended than the discriminatory intent standard, properly understood. And unlike discriminatory intent, they at least hold out the possibility of asking coherent questions in a wide range of cases. The most important doctrinal task is to develop those alternative conceptions of discrimination. Discrimination is a complex phenomenon, both conceptually and practically. Tame doctrine like the discriminatory intent standard is not an adequate way to address it.